92-482

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

THE CHASE MANHATTAN BANK, N.A.,
Petitioner,

v.

AMERICAN LAND TITLE ASSOCIATION, NEW YORK STATE LAND TITLE ASSOCIATION, STEPHEN L. STEINBRINK, in his official capacity as ACTING COMPTROLLER OF THE CURRENCY, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress repealed the provisions of a paragraph of Public Law No. 65-270, appearing at 39 Stat. 752, 753 (1916), formerly codified at 12 U.S.C. § 92 ("section 92"), in 1918 by its enactment of Public Law No. 65-121, 40 Stat. 506 (1918)?

2. If section 92 is still law, whether it "impliedly bars," by negative implication, national banks not located in towns of 5,000 inhabitants or less from engaging in those insurance agency activities that are incidental to the business of banking under authority of section 24 (Seventh) of the National Bank Act, 12 U.S.C. § 24 (Seventh) (1988 & Supp. II 1990)?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The plaintiffs in the district court case were also the appellants in the court of appeals. The plaintiffs were the American Land Title Association and the New York Land Title Association. The defendants in the district court case were also the appellees in the court of appeals. The defendants were Robert L. Clarke, in his official capacity as then Comptroller of the Currency and the Office of the Comptroller of the Currency, an agency of the United States, and The Chase Manhattan Bank, N.A., as Intervenor-Defendant.

LIST OF PARENT CORPORATION AND NONWHOLLY-OWNED SUBSIDIARIES

The only parent company of Applicant is The Chase Manhattan Corporation. The direct and indirect subsidiaries of the Applicant (other than wholly-owned subsidiaries) are:

Banco Chase Manhattan, S.A.

Chase Automated Clearing House, Inc.

Chase Manhattan Administracao & Servicios, S.A.

Chase Manhattan Correctora de Seguras Ltda.

Chase Manhattan Financeira, S.A.

Chase Manhattan S.A. Distribuidora de Titulos e Valores Mobiliacios

Chase Paulista Participacoes, S.A.

Corporacion Falcon, Inc.

Corporacion Mexicana de Aviacion, S.A.

Credit Martiniquais

Electronic Payment Service Company (Hong Kong) Ltd.

Ims Imoveis Ltda.

O.A. Venezolano de Pulpa y Papel

Panterhaven Ltd.

Rating Agency Malaysia Berhad

Societe de Developpement Regional Antilles.

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AMERICAN LAND TITLE ASSOCIATION, NEW YORK STATE LAND TITLE ASSOCIATION, STEPHEN L. STEINBRINK, in his official capacity as ACTING COMPTROLLER OF THE CURRENCY, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

The Chase Manhattan Bank, N.A., by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 968 F.2d 150 (2d Cir. 1992) and reproduced at Appendix ("App.") 1a. The judgment of the district court (App. at 17a) is reported at 772 F. Supp. 1353 (S.D.N.Y. 1991). The approval letter from the Office of the Comptroller of the Currency (App. at 30a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1988).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the National Bank Act, and other related statutory provisions, Act of June 3, 1864, ch. 106, § 8, 13 Stat. 101 (1864) (codified as amended at 12 U.S.C. § 24 (Seventh) (1988 & Supp. II 1990)); Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (1916)[1]; and Act of April 5, 1918, ch. 45, § 20, 40 Stat. 506, 512 (1918), are set forth in Appendix F hereto.

STATEMENT

A. Introduction

This case arises out of the Office of the Comptroller of the Currency's ("OCC") approval of Petitioner's, The Chase Manhattan Bank, N.A. ("Chase"), application to sell title insurance as agent in connection with residential and commercial real estate loans made by Chase and its affiliates. The petition seeks this Court's resolution of a direct and admitted conflict among the United States Courts of Appeals of substantial and recurring importance: whether a provision of the laws relating to national banks formerly codified at 12 U.S.C. § 92 remains in effect. If the Court determines that section 92

[1] Title 12 of the United States Code, unlike a number of other titles, such as Title 18, Title 28, and Title 49, has never been enacted as a positive-law title. The pertinent provision of the 1916 Act was codified at 12 U.S.C. § 92 in 1926, but commencing in 1952 it was dropped from the text of the United States Code, and currently appears neither in the United States Code nor in the United States Code Annotated as published by West. The text given in the Appendix is taken from the text of Volume 39 of the Statutes at Large. For convenience, we will refer to the enactment in question as "section 92."

remains law, this petition presents a second issue of equally substantial and recurring importance over which there is a conflict, albeit not fully acknowledged, among the circuits: whether section 92 "impliedly bars," by negative implication, national banks from engaging in those insurance-related activities determined by the OCC to be incidental to the business of banking under a provision of the National Bank Act ("NBA"), 12 U.S.C. § 24 (Seventh) (1988 & Supp. II 1990) ("section 24 (Seventh)").

The Second Circuit's ruling that section 92 "impliedly bars" *all* national banks not located in small towns "from engaging in insurance agency activities in general," (App. at 14a), eliminates the Comptroller's broad discretion—which discretion has been well respected by this and other federal courts[2]—to determine which insurance activities are incidental to the business of banking under section 24 (Seventh). Moreover, the decision is contrary to numerous administrative rulings over the years by the Comptroller which have been upheld by the courts. If left standing, the adverse economic consequences to the national banking system engendered by this plainly erroneous decision will be substantial.

B. The Statutory and Regulatory Scheme

The OCC is a federal agency charged with supervision and regulation of the nation's approximately 4,500 national banks as well as the administration of the national banking laws. National banks are corporations chartered by the Comptroller of the Currency ("Comptroller") for the purpose of carrying on the business of banking, 12 U.S.C. § 21 (1988), and their corporate powers are defined primarily by the NBA. Section 24 (Seventh) sets forth the basic corporate powers of national banks. In enacting the NBA in 1864, Congress authorized national banks to exercise not only those powers that Congress specifically granted in section 24 (Seventh) (*e.g.*, receiving deposits, lending money, etc.) and elsewhere in the

[2] *See, e.g., Clarke* v. *Securities Indus. Ass'n*, 479 U.S. 388 (1987).

NBA, but also to exercise those "incidental powers . . . necessary to carry on the business of banking." 12 U.S.C. § 24 (Seventh). Over 50 years later, in 1916, Congress *supplemented* the statutory powers of national banks located in towns of 5,000 or fewer inhabitants by expressly authorizing such banks "*in addition to the powers now*[3] *vested by law* in national banking associations" to conduct unlimited insurance agency business by acting as full-service insurance agents "for any fire, life, or other insurance company." Act of Sept. 7, 1916, ch. 461, 39 Stat. 753 ("section 92") (emphasis added).

Under regulations promulgated by the Comptroller, 12 C.F.R. § 5.34 (1992), national banks may establish "operating subsidiar[ies]" to engage in activities "which are part of or incidental to the business of banking." *Id.* § 5.34(c). A national bank proposing to perform new activities through an operating subsidiary is required to submit a written notification to the OCC. *Id.* § 5.34(d)(1). Upon receipt, the OCC reviews the written notification "to determine if the proposed activities exceed those legally permissible for a national bank's operating subsidiary and to ensure that the proposal is consistent with prudent banking principles and [OCC] policy." *Id.* § 5.34(d)(1)(iii).

C. Comptroller's Approval

Pursuant to this statutory and regulatory framework, on March 3, 1989, Chase, a national banking association, notified the OCC in writing (the "Notification Letter") that it intended to establish two operating subsidiaries to sell title insurance as agent in connection with residential and commercial real estate loans made by Chase and its affiliates. By letter dated June 20, 1989, the OCC approved Chase's Notification Letter based upon the OCC's determination that "selling title insurance is incidental to national banks' explicit authority to make, arrange, buy and sell mortgage loans under 12 U.S.C. §§ 24(7) and

[3] The date of enactment was September 7, 1916.

371."[4] App. at 32a. The OCC found that Chase's proposal to sell title insurance as agent was "consistent in all material respects"[5] with a 1986 interpretive letter concluding that selling title insurance is incidental to the business of banking and therefore is a permissible activity for national banks (the "1986 Interpretive Letter").[6]

In concluding that section 92 did not prohibit national banks from acting as agent in the sale of title insurance, the 1986 Interpretive Letter relied on the decision of the Court of Appeals for the District of Columbia Circuit in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) ("*Heimann*"), which, as the OCC noted, rejected the "proposition that national banks' incidental powers are limited to those permitted under 12 U.S.C. § 92." App. at 42a. In addition, the OCC's approval of the Notification Letter comported with the position taken by the OCC since at least 1965 that "a National Bank, wherever located, may, under its corporate powers contained in

[4] The OCC noted that this determination "also is supported by judicial recognition that it is incidental to banking, and therefore permissible, for national banks to sell forms of limited purpose insurance related to the traditional lending activities of banks." App. at 32a.

[5] *Id.*

[6] Comptroller Interp. Letter No. 368, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986) (App. at 33a). The 1986 Interpretive Letter was challenged by the American Land Title Association on the ground that "[s]ection 92 prohibits national banks from engaging in title insurance activities in communities with populations exceeding 5,000." *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. 491, 497 (W.D. Tex. 1989). ALTA also challenged in that case a second OCC Interpretive Letter, Comptroller Interpretive Letter No. 377, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,601 (Feb. 6, 1987), which approved title insurance agency and underwriting activities by a national bank operating subsidiary. The court dismissed the lawsuit, ruling that the Interpretive Letters did not constitute "final agency action" and that the matter therefore was not ripe for review. *American Land Title Ass'n* v. *Clarke*, 743 F. Supp. at 498-99.

paragraph Seventh of 12 U.S.C. 24, act as an agent in the issuance of title insurance which is incident to a banking transaction." [7]

D. The District Court Decision

The American Land Title Association and the New York State Land Title Association (hereinafter collectively referred to as "ALTA") filed a complaint in the District Court for the Southern District of New York challenging the OCC's approval of the Notification Letter.[8] The complaint alleged that national banks not headquartered in small towns are impliedly prohibited from engaging in title insurance activities by section 92, that title insurance activities are authorized neither by the incidental powers clause of section 24 (Seventh) nor any other provisions of federal law, and that such activities therefore are "*ultra vires*." ALTA sought declaratory and injunctive relief.

The district court granted defendants OCC's and Chase's motions to dismiss the complaint. Applying the principles governing judicial deference to an agency's interpretation of its governing statute outlined in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984) ("*Chevron*"), the district court held that the OCC had rationally concluded "that the sale of title insurance in connection with real estate loans made by a national bank is incidental to the express power of a national bank to make real estate loans." App. at 26a. The court further ruled that "it is rational to conclude that title insurance, like credit life insurance,[9] is an activity considered incidental to the business of banking

[7] Letter from R. Coleman Egertson, Deputy Comptroller of the Currency (Aug. 3, 1965). App. at 45a.

[8] Chase moved for and was granted leave to intervene as a defendant.

[9] The sale of credit life insurance as agent by national banks was at issue in *Heimann*.

in that it is a limited type of coverage that protects the lender in the event of a default." *Id.*

In so holding, the district court rejected ALTA's contention that section 92—the 1916 statute permitting national banks located in small towns to act as general agent in the sale of any type of insurance without regard to whether the sale of such insurance is incidental to the business of banking—should be interpreted impliedly to prohibit, by negative implication, national banks doing business in places with populations of greater than 5,000 from engaging in the sale, as agent, of title insurance as an incident to the business of banking. The district court concluded that "it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision, not a limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh)." *Id.* In upholding the OCC's administrative ruling, the district court noted that "courts have held in the past that various types of 'insurance' are incidental to the business of banking and not prohibited by § 92." App. at 25a.

E. The Court of Appeals Decision

ALTA appealed on the ground "that the district court erred in upholding the OCC's view that 12 U.S.C. § 92 places no limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh)." App. at 11a. In an opinion issued June 15, 1992, the court of appeals for the Second Circuit agreed with ALTA, reversed the judgment of the district court and directed it to enter summary judgment for ALTA. App. at 16a.

Before addressing the contentions of the parties, however, the Second Circuit felt "compelled to address" the issue whether section 92 remained in effect, "even though the parties neither briefed nor argued it." App. at 3a. After the present case already had been submitted for decision to the Second Circuit, the D.C. Circuit held in *Independent Insurance Agents* v. *Clarke*, 955 F.2d 731,

739 (D.C. Cir. 1992), that "section 92 has ceased to exist" due to Congress' omission of section 92 when it revised and reenacted section 5202 of the Revised Statutes in 1918. According to the D.C. Circuit, even "[i]f the deletion of section 92 was a mistake, it is one for Congress to correct, not the courts." *Id.*

The Second Circuit flatly rejected the D.C. Circuit's ruling, holding instead that section 92 remains in full force and effect. The Second Circuit said: "[c]ontrary to the view of the D.C. Circuit, we believe that this omission was inadvertent and thus we do not interpret it as having effected a repeal of section 92." App. at 5a.

After ruling that section 92 "remains valid law," the Second Circuit took up ALTA's contention that "section 92 impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants." App. at 11a. While acknowledging that section 92 "obviously provides no *explicit* limitation on national bank activity," the court of appeals nevertheless concluded that section 92 should be interpreted to "*impliedly bar*[] national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general," a holding which it applied to the title insurance agency business in particular. App. at 11a, 14a (emphasis added).[10]

In attempting to bolster this ruling with its analysis of two letters from what it called the "sparse" legislative history of section 92,[11] the court ignored the plain language of section 92 in which Congress unambiguously

[10] In reaching this conclusion, the court relied upon the questionable principle of *expressio unius est exclusio alterius* as applied, or misapplied, in the widely questioned decision in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010, 1013-14 (5th Cir. 1968).

[11] App. at 12a. These documents consisted of a letter from counsel to the Federal Reserve Board to a governor of the Board and a letter from the Comptroller to the Senate Banking Committee.

declared that the powers granted by section 92 were "in addition to the powers now vested by law in national banking associations." [12] In disregard of this determinative textual statement of congressional intent on the precise question at issue, the court found "that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents." App. at 12a.[13]

The court of appeals never reached the issue whether title insurance agency activities are incidental to the business of banking under section 24 (Seventh), saying that "[b]ased on our interpretation of section 92, we see no need to determine the scope of section 24 (Seventh)." [14]

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[12] App. at 48a. In parsing these letters for the barest glimmers of legislative intent, the court ignored the fact that the Comptroller's letter on which it relied stated that the purpose of section 92 was to "enlarge" the powers of small town banks in order to improve their profitability. 53 Cong. Rec. 11,001 (July 14, 1916). Nor did the court consider the contrary legislative analysis of the Eighth Circuit in *Independent Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 736 F.2d 468, 477 n.6 (8th Cir. 1984): "[t]he legislative history [of section 92] indicates that Congress was concerned only with providing small-town banks with an additional profit source, *not with prohibiting city banks from selling insurance*." (emphasis added).

[13] In light of its determination that section 92 clearly "evinces" Congress' intent, the court reviewed the OCC's construction of section 92 under the first prong of *Chevron* and declined to accord any deference to the OCC's ruling, stating that "[t]o defer to the OCC in this case would flout Congressional intent—something we remain unwilling to do." App. at 16a.

[14] If this Court determines that section 92 does not exist or, if it does exist, does not limit national banks' incidental powers under section 24 (Seventh), the Court may remand this case to the Second Circuit for determination of this issue. Alternatively this Court may, "in the interest of judicial economy" and in light of the district court's compelling analysis of this issue, wish to determine

App. at 15a. Having determined that section 92 impliedly "prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business," the court concluded that "even if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the *specific limits* on insurance activity *contained in section 92*." App. at 16a (emphasis added). Section 92, however, contains no such "specific limits" and its express language does not address, much less preclude, national banks located in larger communities from engaging in those insurance agency activities that are incidental to the business of banking.

REASONS FOR GRANTING THE WRIT

The court of appeals' decision warrants this Court's attention because it presents issues of substantial and recurring nationwide importance concerning the scope of national banks' powers that have generated conflicting holdings among the courts of appeals. As the Second Circuit expressly acknowledged, its decision in this case conflicts with the recent holding of the D.C. Circuit that "section 92 has ceased to exist."[15] In addition, the Second Circuit's ruling that section 92 "impliedly bars" national banks from engaging in insurance agency activities, even if such activities are in lines of insurance incidental to the business of banking under section 24 (Seventh), conflicts with an earlier decision of the D.C. Circuit rejecting the argument that section 92 "by clear implication" barred national banks in towns of more than 5,000 inhabitants from selling credit life insurance. *Independent Bankers*

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at this time whether the Comptroller acted within the broad confines of his allowable discretion in determining that section 24 (Seventh) authorizes national banks to act as agents in the sale of title insurance. *See Grosso* v. *United States*, 390 U.S. 62, 71-72 (1968); 28 U.S.C. § 2106 (1988).

[15] *Independent Ins. Agents* v. *Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992).

Ass'n v. *Heimann*, 613 F.2d 1164, 1169 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980).[16] Although the Second Circuit did not explicitly acknowledge this conflict, the court clearly failed in its strained attempt to distinguish *Heimann* based on its flawed understanding of the nature of credit life and title insurance. *See* p. 17 n.29.

The decision of the Second Circuit sharply curtails the fundamental statutory authority of all national banks to exercise those "incidental powers" under section 24 (Seventh) that are necessary to carry on the business of banking. Enacted as part of the original NBA in 1864, this essential statutory authority has played a critical role in the long-term success and viability of the national banking system. The decision below directly undermines the authority of national banks to continue to engage in a broad range of activities that are both convenient and necessary to their continuing viability and vitality.

The Second Circuit's decision squarely contravenes the plain language of section 92 and mistakenly relies on isolated snippets of ambiguous legislative history taken out of context to override the plain meaning of an unambiguous statutory declaration of congressional intent on the precise question at issue in this litigation—whether section 92 constitutes a supplement to or limitation on national banks' incidental powers under section 24 (Seventh). Further, the court of appeals failed to accord the Comptroller's interpretation of sections 92 and 24 (Seventh) the "substantial deference" that this Court often has stated is required.

As a consequence, the Second Circuit has put those national banks within its jurisdiction at a distinct competitive disadvantage both as to other types of financial institutions, and possibly as to national banks located in

[16] The *Heimann* court "presumed" the continuing validity of section 92. *See Independent Ins. Agents* v. *Clarke*, 955 F.2d at 737.

other circuits that have not construed section 92 as impliedly barring the exercise of statutory powers granted elsewhere in the national banking statutes.[17] The circuit courts have reached an irreconcilable impasse on this issue. Guidance from this Court is urgently needed to put an end to nearly 25 years of confusion and uncertainty regarding the relationship between section 92 and section 24 (Seventh), and, indeed, to resolve the issue of section 92's existence. Both are issues of substantial importance to the national banking system.

I. CONFLICT REGARDING THE CONTINUED EXISTENCE OF SECTION 92

The D.C. Circuit recently decided the same issue initially faced by the Second Circuit in this case—whether Congress repealed section 92 in 1918—and reached the opposite conclusion, ruling that "Congress has stricken [section 92] from the statute books." *Independent Ins. Agents*, 955 F.2d at 739. The Second Circuit, as noted above, expressly rejected the ruling of its sister circuit and held that "section 92 remains valid law." App. at 10a.

Resolution of this issue of substantial and recurring[18] national importance may easily dispose of the longstand-

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[17] Before the district court, ALTA sought a nationwide injunction against the Comptroller's authorizing national banks in general to act as agent in the sale of title insurance; the court of appeals, in reversing the district court's dismissal of the complaint, remanded the case to the district court with instructions "to enter summary judgment for the appellants." App. at 16a. Thus, the possibility of an injunctive order of nationwide applicability purporting to restrain the Comptroller from permitting *any* national bank to act as agent for the sale of title insurance is presented.

[18] See *Owensboro Nat'l Bank* v. *Moore*, No. 91-3, slip op. at 16 (E.D. Ky. Aug. 4, 1992), in which the district court recently adopted the analysis of the Second Circuit as its own in holding that Congress did not repeal section 92.

ing controversy over the relationship between section 92 and section 24 (Seventh). If this Court determines that Congress did in fact repeal section 92, this nonexistent statute obviously no longer could be held impliedly to bar the exercise by national banks of powers granted by another statutory provision--section 24 (Seventh). In the event of such a ruling, the only issue remaining would be whether the broad grant of powers in section 24 (Seventh), considered in and of itself and in the light of its consistent interpretation by the OCC, would authorize the sale of title insurance as agent by national banks as incidental to the business of banking.[13]

Little elaboration is necessary to make the point that the question of the continued existence of an Act of Congress--a question admittedly answered in contradictory terms by two contemporaneous decisions of two courts of appeals--is a question worthy of this Court's attention. The considerations in favor of this Court's review become all the more compelling where the Act in question not only provides an important authority of its own but has been the source of conflict between the federal courts of appeals concerning whether it, by negative implication, negates powers of national banks which would otherwise exist.

II. CONFLICT REGARDING WHETHER SECTION 92 "IMPLIEDLY BARS" ALL NATIONAL BANK INSURANCE AGENCY ACTIVITIES NOT EXPRESSLY AUTHORIZED THEREIN

The Second Circuit ruled that section 92, which does not require that the insurance agency powers exercised pursuant thereto be incidental to the business of banking, "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general." App. at 14a. It applied this ruling to all national banks in places with more than 5,000

[13] We submit that the answer to this question is clearly "yes"; the court of appeals, however, did not reach it.

inhabitants without considering whether specific insurance agency activities—such as credit life or title insurance—are incidental to the business of banking and therefore permissible under section 24 (Seventh). It thus adopted a position consistently rejected by the Comptroller, and rejected by the D.C. Circuit and other federal courts.[20] In reaching its decision, the Second Circuit relied primarily on the statutory analysis contained in the Fifth Circuit's pre-*Chevron* decision in *Saxon* v. *Georgia Ass'n of Independent Insurance Agents*, 399 F.2d 1010 (5th Cir. 1968) ("*Saxon*"). In *Saxon*, the Fifth Circuit overturned an administrative ruling of the OCC that "National Banks have the authority to act as agent in the issuance of insurance which is incident to banking transactions." *Id.* at 1012. According to the *Saxon* court, "[s]ince Congress dealt specifically with the insurance agency power in Section 92, the *expressio unius* rule negates the existence of any other power to act as an insurance agent under the general provisions of Section 24(7)." *Id.* at 1014.

During the 24 years that have elapsed since the *Saxon* decision, the OCC and a number of federal courts have disagreed with and refused to follow it. The OCC long has taken the position that *Saxon* was wrongly decided, and has repeatedly ruled that section 92 "does not prohibit a national bank from conducting insurance-related activities if the activities are otherwise authorized by the National Bank Act." Comptroller Interp. Letter No. 331, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,776 (Apr. 4, 1985). *See also* Comptroller Interp. Letter No. 283, [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447, at 77,609 (Mar. 16, 1984) ("[A] national bank may act as agent

[20] In addition, a California Court of Appeal has interpreted a California banking statute, that was copied virtually word-for-word from section 92, as not imposing any restrictions upon the incidental authority of state banks to offer insurance products outside of towns of 5,000 or fewer persons. *Sanford* v. *Garamendi*, 284 Cal. Rptr. 897, 903 (Ct. App. 1991).

in the sale of insurance regardless of 12 U.S.C. § 92, when doing so is incidental to banking.")). The "traditional position of the OCC" is that section 92 simply provides supplemental authority for banks in small towns to act as general insurance agents for *all* types of insurance, without limitation, and "does not affect the powers of national banks located in towns that have a population larger than 5,000." Comptroller Interp. Letter No. 499, [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,213 (Feb. 12, 1990).

The OCC's longstanding disagreement with the *Saxon* court's interpretive approach under section 92 is evidenced by the broad array of insurance and insurance-related activities the OCC has authorized since *Saxon* as incidental to the business of banking. For example, the OCC has authorized national banks to offer debt cancellation contracts,[21] municipal bond insurance,[22] credit-related life insurance,[23] mortgage life insurance, credit disability insurance, involuntary unemployment insurance, vendor's single interest insurance,[24] fixed annuity

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[21] 12 C.F.R. § 7.7495 (1992); *First Nat'l Bank* v. *Taylor*, 907 F.2d 775, 777-78 (8th Cir.), *cert. denied*, 111 S. Ct. 442 (1990).

[22] *See* Comptroller Interp. Letter No. 338, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,508, at 77,792 (May 2, 1985); *American Ins. Ass'n* v. *Clarke*, 865 F.2d 278 (D.C. Cir. 1988).

[23] 12 C.F.R. § 2.6 (1992); Comptroller Interp. Letter No. 277, [1982-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,441 (Dec. 21, 1983) (underwriting credit life insurance).

[24] Comptroller Interp. Letter No. 283, [1983-84 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,447 (Mar. 16, 1984) (agent for sale of credit life and disability, involuntary unemployment and vendor's single interest insurance); Comptroller Interp. Letter No. 495, [1989-90 Transfer Binder] Fed. Banking L. Rep. ¶ 83,084, at 71,204 (Dec. 22, 1989).

products,[25] variable annuity products,[26] and title insurance.[27]

As the district court in this case noted in upholding the Comptroller's approval of Chase's Notification Letter, a number of the Comptroller's administrative rulings authorizing these insurance-related activities as being incidental to the business of banking "and not prohibited by § 92" have been considered and upheld by the federal courts. App. at 25a. For example, in *American Insurance Ass'n* v. *Clarke*, 865 F.2d 278, 281 (D.C. Cir. 1988), the D.C. Circuit upheld the Comptroller's determination that a national bank may offer municipal bond insurance through a subsidiary pursuant to its incidental powers under section 24 (Seventh).

Similarly, in *Independent Bankers Ass'n* v. *Heimann*, 613 F.2d at 1170, the D.C. Circuit held that the incidental powers clause of section 24 (Seventh) authorizes national banks, irrespective of their location, to act as agents for the sale of credit life insurance. The D.C. Circuit rejected the contention, accepted by the Second Circuit in this case, that section 92 "carries a clear implication" that national banks in towns of more than 5,000 inhabitants "have no authority" to act as agent in the sale of insurance. *Id.* In so ruling, the D.C. Circuit,

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[25] *See* Comptroller Interp. Letter No. 499, [1989-90 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 83,090, at 71,211-12 (Feb. 12, 1990).

[26] *See* Comptroller Interp. Letter No. 331, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,501, at 77,776 (Apr. 4, 1985).

[27] *See* Comptroller Interp. Letter No. 368, [1985-87 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,858 (July 11, 1986) (agent for sale of title insurance); Comptroller Interp. Letter No. 377, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,601, at 77,901 (Feb. 6, 1987) (underwriting title insurance); Comptroller Interp. Letter No. 450, [1988-89 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,674, at 78,062 (Sept. 22, 1988).

unlike the Second Circuit in this case, took special note of the fact that "by its own terms, [section 92] does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." [28] *Id.* at 1170 n.18. The court below made a half-hearted attempt to distinguish *Heimann* [29] but then appeared to acknowledge a conflict by claiming that the *Heimann* opinion lacked persuasiveness. App. at 15a.

In *Variable Annuity Life Insurance Co.* v. *Clarke*, 786 F. Supp. 639 (S.D. Tex. 1991), *appeal filed*, No. 92-2010 (5th Cir.), the district court signaled the widespread erosion in support for *Saxon* even within the Fifth Circuit in upholding the Comptroller's determination that a

[28] Similarly, in *Independent Insurance Agents* v. *Board of Governors of the Federal Reserve System*, 736 F.2d at 477 n.6, the Eighth Circuit observed that "[t]here is a strong argument that *Saxon* was wrongly decided. The legislative history indicates that Congress was concerned only with providing small-town banks with an additional profit source, not with prohibiting city banks from selling insurance."

[29] The court of appeals attempted to distinguish *Heimann* by claiming that credit life insurance was analytically different from title insurance in respects pertinent to this case. The court mistakenly asserted that, in the sale of credit life insurance, the bank assumed the risk of the borrower's death; rather, the insurance company assumes such risk. The court also misunderstood the purpose of credit life insurance. It is not the case, contrary to the court's understanding, that credit life insurance "protects only the lender's interest by insuring that his loan will be repaid even if the borrower dies." (App. at 15a); all forms of credit life insurance protect the interests of both the lender and the borrower's estate. *See* 1986 Interpretive Letter, App. at 33a-34a. If a borrower obtains a $10,000 loan, takes out credit insurance, and dies the next day, his estate is $10,000 richer than if the loan and the the insurance had never been effected. In fact, title insurance often is sold in a form that protects only the mortgagee's interest and not the equity owner's interest. The distinction, accordingly, cuts in exactly the opposite way from what the court said. In any event, the supposed distinction between credit life and title insurance is irrelevant to the central issue raised the effect of section 92 on the powers granted national banks by section 24 (Seventh).

national bank may sell various types of annuity contracts on an agency basis. In language nearly identical to that used by the district court in the present case, the court ruled "that it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision and not a limitation on national banks incidental powers under § 24(7)." *Id.* at 642.

In reliance upon the OCC's approval of the broad array of insurance-related activities summarized above as being incidental to the business of banking, national banks presently conduct a large volume of business as agents for, or brokers of, a variety of insurance products. The decision of the Second Circuit that section 92 "impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities *in general*," directly threatens the continuing ability of national banks located within the Second Circuit and possibly beyond,[39] to engage in these regulatorily authorized insurance-related activities which are incidental to the business of banking and therefore permissible under section 24 (Seventh). App. at 14a (emphasis added).

Under the Second Circuit's decision, the ability of national banks to exercise incidental powers available under section 24 (Seventh) may vary according to their location. Banks within the D.C. Circuit's jurisdiction (and indeed in all jurisdictions outside of the Second Circuit and possibly the Fifth Circuit) may remain able—depending on the ultimate scope of the yet to be issued injunction—to engage in a broad range of insurance-related activities without restraint or limitation from section 92, as long as such activities are incidental to the business of banking. National banks located within the Second Circuit, in contrast, will be prohibited from engaging in such incidental insurance-related activities. Resolution of this untenable

[39] *See* Section IV pp. 24-25.

situation necessitates this Court's review of the important intercircuit conflict presented by this case.

III. THE COURT OF APPEALS' DECISION CONTRAVENES NUMEROUS BASIC RULES OF STATUTORY CONSTRUCTION

Not only does the Second Circuit's decision raise important issues, its departure from the norms of statutory construction endorsed by this Court warrants review.

A. Ignoring the Plain Meaning Rule

The best indication of a statute's meaning is its express language: "the beginning point must be the language of the statute, and when a statute speaks with clarity to an issue, judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992). *See also Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991); *Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-75 (1986); *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

The opening phrase of section 92 which states that the powers granted by that section were "in addition to the powers now vested by law in national banking associations," provides a clear, unambiguous signal that in enacting section 92, Congress intended to grant supplemental powers to a specified class of national banks rather than limiting the powers previously granted to all national banks by the provisions of the NBA.[31] The phrase "in addition to" is so clear as to be beyond interpretation. It means adding, increasing, or augmenting. Oxford English Dictionary 104 (Compact ed. 1971). By its plain terms, section 92 is an express grant of additional statutory authority to a limited class of national banks, those

[31] As noted above, all national banks had been authorized by section 24 (Seventh) to exercise those "incidental powers . . . necessary to carry out the business of banking" for over 50 years prior to the enactment of section 92.

in small towns, to conduct unlimited insurance agency business by acting as full-service insurance agents, without regard to whether such activities are incidental to the business of banking. The court below erred in holding that this limited, permissive statute impliedly prohibits all national banks not described therein from engaging in insurance activities otherwise authorized by section 24 (Seventh) as incidental to the business of banking.[42]

B. Ignoring the Rule of Deference to Administrative Statutory Construction

The courts may invalidate the Comptroller's decision only if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). In applying this standard, it is well settled that

> "courts should give great weight to *any reasonable construction* of a regulatory statute adopted by the agency charged with enforcement of that statute. The Comptroller of the Currency is charged with the enforcement of banking laws to an extent that warrants the invocation of this principle with respect to his deliberative conclusions as to the meaning of these laws."

Clarke v. *Securities Indus. Ass'n*, 479 U.S. 388, 403-04 (1987) (quoting *Investment Co. Inst.* v. *Camp*, 401 U.S. 617, 626-27 (1971)) (emphasis added) (citation

[42] "By its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies." *Heimann*, 613 F.2d at 1170, n.18. *Accord Variable Annuity Life Ins. Co.* v. *Clarke*, 786 F. Supp. at 641 (noting that the plain language of section 92 permits national banks in towns with populations less than 5,000 to act as agent for fire, life or other general insurance companies, but does not speak to prohibitions in towns greater than 5,000); *Sanford* v. *Garamendi*, 284 Cal. Rptr. at 903 ("[E]xpress grant of authority to a limited class of banks to sell specified types of insurance . . . does not, merely because of its limited permissive application, impliedly prohibit all banks not described therein generally from selling insurance.").

omitted). *See also Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. at 842-44.[33]

Before a court reviews an agency's construction of a statutory provision however, it must first determine as a preliminary matter whether Congress has addressed the specific question at issue. *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-53. *See also Board of Governors of the Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. at 373 (plain purpose of legislation determined by reference to plain language of statute itself). At issue in this case is whether section 92 is a supplemental powers provision or a limitation on national banks' incidental powers under section 24 (Seventh). Congress clearly has addressed this question. The phrase—"in addition to"—prefacing section 92 provides a definitive statement of Congress' intent to supplement, not limit, national banks' existing statutory powers. Accordingly, the court of appeals' inquiry should have ended with the actual words of the statute.

If, however, it somehow could be found that those words alone are not sufficient evidence of congressional intent, the court of appeals would be required to defer to any reasonable interpretation by the Comptroller. *Chevron*, 467 U.S. at 844 (court precluded from substituting its own judgment if agency's decision is rational and reasonable); *Clarke* v. *Securities Indus. Ass'n*, 479 U.S. at 403-04. Although a court may not uphold an administrative

[33] *Accord Department of Banking & Consumer Fin.* v. *Clarke*, 809 F.2d 266, 269 (5th Cir.) ("We are charged to uphold the Comptroller's determination if we find it to be a 'permissible construction' of the National Bank Act."), *cert. denied*, 483 U.S. 1010 (1987); *see also First Nat'l Bank* v. *Taylor*, 907 F.2d at 777-78; *Securities Indus. Ass'n* v. *Clarke*, 885 F.2d 1034, 1042 (2d Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Investment Co. Inst.* v. *Conover*, 790 F.2d 925, 932 (D.C. Cir.), *cert. denied*, 479 U.S. 939 (1986).

statutory interpretation that is contrary to the "clear meaning of a statute as revealed by its language, purpose and history," *Southeastern Community College* v. *Davis*, 442 U.S. 397, 411 (1979) (quoting *International Bhd. of Teamsters* v. *Daniel*, 439 U.S. 551, 566 n.20 (1979)), the agency's interpretation need not be shown to be the only permissible view, *Chevron*, 467 U.S. at 843 n.11.

C. Abuse of "Expressio Unius" Maxim

The court of appeals also erred in relying on the discredited maxim of *expressio unius* to override the plain meaning of the statutory language. Courts repeatedly have recognized that the maxim is unreliable at best and in any event should not be applied where it would produce a result in contravention of clear statutory language or a consistent administrative statutory construction.[31]

Of direct relevance to this case, the courts have held that the *expressio unius* maxim "should not prevail when a nonexclusive reading [of the statute] . . . *allows the exercise of incidental authority necessary to an expressed power or right.*" *Bailey* v. *Federal Intermediate Credit Bank*, 788 F.2d 498, 500 (8th Cir.), *cert. denied*, 475

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[31] *See, e.g., Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 387 n.23 (1983) (rejecting application of maxim and noting maxim must be subordinate to doctrine that courts will construe details of an act in conformity with its dominating general purpose); *Pauley* v. *BethEnergy Mines, Inc.*, 111 S. Ct. 2524, 2537-38 (1991) (maxim "'is a questionable one in light of the dubious reliability of inferring specific intent from silence'" (quoting Cass R. Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2109 n.182 (1990))); *Director* v. *Bethlehem Mines Corp.*, 669 F.2d 187, 197 (4th Cir. 1982) ("maxim is to be applied with great caution and is recognized as unreliable"); *Neuberger* v. *Commissioner*, 311 U.S. 83, 88 (1940) (maxim can never override clear and contrary evidence of Congress' intent); *Cheney R.R. Co.* v. *I.C.C.*, 902 F.2d 66, 68-69 (D.C. Cir.) (agency view overcomes *expressio unius* canon), *cert. denied*, 111 S. Ct. 519 (1990); *Clinchfield Coal Co.* v. *Federal Mine Safety & Health Comm'n*, 895 F.2d 773, 779 (D.C. Cir.) (maxim not applied to override *Chevron*), *cert. denied*, 111 S. Ct. 137 (1990).

U.S. 915 (1986) (emphasis added). *See also* 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.25, at 234 (5th ed. 1992 Rev.). The court of appeals ignored the very substantial limitations on the use of this maxim of questionable validity and incorrectly relied on it as the basis for disregarding the plain meaning of the explicit statutory language of section 92.

Moreover, even if the maxim were pertinent here, the court of appeals' application of the *expressio unius* maxim was incorrect. As applied to section 92, the maxim would at most suggest that national banks in places of greater than 5,000 inhabitants cannot engage in the full range of general insurance agency activities authorized by section 92; the maxim does not have any application with respect to specific insurance agency activities that are incidental to banking under section 24 (Seventh). Accordingly, even assuming *arguendo* that the *expressio unius* maxim were applicable in this case, the Second Circuit's interpretation of that canon was improper.

D. Misuse of Legislative History

Finding no basis in the plain language of section 92 to displace the Comptroller's approval of Chase's Notification Letter, the court of appeals mistakenly interpreted isolated documents from section 92's extremely limited legislative history as supporting an implied limitation on section 24 (Seventh)'s broad grant of "incidental powers." The meager and ambiguous legislative history that exists does not contradict the section 92 text and the Comptroller's interpretation of it as a supplemental powers provision. The courts have recognized that section 92 was originally proposed by the Comptroller to provide an additional source of revenue for national banks located in small towns and not to prohibit city banks from selling insurance where incidental to banking transactions.[35]

[35] *Independent Ins. Agents*, 736 F.2d at 477 n.6; *Saxon*, 399 F.2d at 1015; *Heimann*, 613 F.2d at 1169-70; *see also Variable Annuity*

In recommending adoption of section 92, then-Comptroller Williams stated in a letter to the Chairmen of the Senate and House Banking Committees that "[f]or some time I have been giving careful consideration to the question as to how *the powers* of the national banks might be *enlarged* so as to provide them with additional sources of revenue . . . ." [36] 53 Cong. Rec. 11,001 (July 14, 1916). Similarly, Senator Owen, the Chairman of the Senate Banking Committee, described Comptroller Williams' proposed amendment as "*giving some additional powers* to the small banks to act as agents in insurance." *Id.* at 11,153 (emphasis added). Nowhere in the legislative history is there any reference to a Congressional intent to bar or limit powers already authorized under section 24 (Seventh).

IV. THE COURT OF APPEALS' DECISION SUBJECTS NATIONAL BANKS TO SIGNIFICANT COMPETITIVE INEQUALITIES

The Second Circuit's decision places national banks at a significant competitive disadvantage to state banks, savings and loan associations, and other financial institutions that are able to offer various types of insurance

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Life Ins. Co., 786 F. Supp. at 641 (legislative history indicates section 92 proposed to provide additional source of revenue).

[36] The Second Circuit's heavy reliance on Comptroller William's letter as "provid[ing] evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance," plainly is misplaced. App. at 13a. As the OCC explained in promulgating its regulations governing the sale of credit life insurance by national banks, "[a]lthough the Comptroller assumed in requesting [the enactment of section 92] that national banks lacked incidental power under 12 U.S.C. 24 (Seventh) to act as a full scale insurance agent . . . neither the language nor the legislative history of the section suggests that national banks would not possess ample authority under the incidental powers clause of 12 U.S.C. 24 (Seventh) to provide [credit life insurance]." 42 Fed. Reg. 48,518 (1977).

products.[37] Substantial competitive disruptions may occur as a result of the conflict among the courts of appeals produced by this decision. National banks located in states outside of the Second Circuit could continue to engage in insurance activities incidental to the business of banking, while national banks located within the Second Circuit would be precluded from engaging in such activities.

Moreover, all national banks will be significantly affected by the court of appeals' decision if the district court, which has been directed to enter summary judgment for ALTA, issues the nationwide injunction against the OCC requested in ALTA's complaint. For example, national banks currently engaged in the sale of credit life insurance, municipal bond insurance, and annuities will be faced with significant uncertainty as to the continuing legality of these activities. It is unlikely that national banks seeking to obtain the Comptroller's approval to offer such products would be able to obtain that approval.

The increasing competition posed by nonbank financial institutions to the banking industry dictates that national banks not be judicially restrained from exercising the full range of their available statutory powers. To deny national banks the power to engage in those insurance-related activities that the OCC reasonably has determined are incidental to the business of banking will eliminate important business opportunities and thereby diminish

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[37] *See* Comptroller Interp. Letter No. 368, [1985-87 Transfer Binder], Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,839 (July 11, 1986) (noting savings and loan associations are authorized to act as agents in sale of title insurance); *State Bank Powers*, Banking Pol'y Rep., June 1, 1992, at 4 (fifteen states permit state banks to engage in insurance activities); Ford Barrett, *Remarks to the Third Annual Banks in Insurance Conference, reprinted in* 6 OCC J., at 36-37 (Mar. 1987) (several major insurance companies not only provide banking services, but actually own banks).

significantly national banks' ability to compete profitably in today's extremely competitive financial services marketplace. Review of a decision having such an effect is clearly warranted.

CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 1992

APPENDICES

APPENDIX A

OPINION OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AMERICAN LAND TITLE ASSOCIATION,
NEW YORK STATE LAND TITLE ASSOCIATION,
Plaintiffs-Appellants,

-v.-

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, OFFICE OF THE COMPTROLLER OF THE CURRENCY, an agency of the United States, Defendants-Appellees, THE CHASE MANHATTAN BANK, N.A.,
Intervenor-Defendant-Appellee.

Docket No. 91-6235

January 7, 1992, Argued and submitted

June 15, 1992, Decided

JUDGES: Before: OAKES, Chief Judge, MESKILL and PRATT, Circuit Judges.

OPINION BY: OAKES

OPINION: OAKES, Chief Judge:

The issue in this appeal is whether two provisions of the National Bank Act, 12 U.S.C. §§ 92 and 24 (Seventh) (1988), permit national banks to engage in the title insurance agency business.

I.

Appellants the American Land Title Association and the New York State Land Title Association (collectively

ALTA), brought suit in the United States District Court for the Southern District of New York against appellees Robert L. Clarke, in his official capacity as Comptroller of the Currency, and the Office of the Comptroller of the Currency (collectively OCC), seeking declaratory and injunctive relief that would, *inter alia*, void a June 1989 OCC decision permitting The Chase Manhattan Bank, N.A. (Chase Manhattan) to engage in the title insurance agency business, and would direct the OCC to refrain from authorizing any other national bank from engaging in this business. Chase Manhattan subsequently intervened as a party defendant (OCC and Chase Manhattan are collectively referred to as OCC).

The OCC rendered the decision at issue in its role as regulator of national banks and administrator of national banking laws. The decision authorized Chase Manhattan to proceed with its proposal to establish two operating subsidiaries designed to sell title insurance, as agents, to borrowers and lenders in connection with real estate loans made by the bank and its affiliates. The proposal further provided that borrowers would not be obligated to buy title insurance through the subsidiaries, and a borrower's failure to use the subsidiaries would not affect Chase Manhattan's other dealings with the borrower. The OCC based its decision on an interpretive letter issued in 1986, OCC Staff Interpretive Letter No. 368, [1985-1987 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,538, at 77,836 (July 11, 1986), that allowed a national bank to act as agent in the sale of title insurance.

Mary Johnson Lowe, *district judge*, denied ALTA's motion for summary judgment and granted the OCC's motion for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure. ALTA now appeals. For the reasons set forth below, we reverse.

II.

A. Validity of 12 U.S.C. § 92

We note at the outset the existence of some question, dating back at least to the 1950s, regarding the validity of 12 U.S.C. § 92. This question arose because in 1918, two years after section 92 was enacted, a revision and reenactment of section 5202 of the Revised Statutes of the United States omitted section 92. Neither the OCC nor ALTA are troubled by this issue. The Supreme Court, albeit in dicta, has mentioned that section 92 was omitted from the 1918 enactment but assumed it remained valid. *Commissioner v. First Sec. Bank of Utah*, 405 U.S. 394, 401 n.12 (1972). Even Congress must have thought the provision valid because in Pub. L. No. 97-320, § 403(b); 96 Stat. 1469, 1511 (1982), it enacted an amendment to section 92 striking out some of its language. But the D.C. Circuit recently saw fit to add a new layer to this debate by declaring, sua sponte, that "section 92 has ceased to exist." *Independent Ins. Agents of Am. v. Clarke*, 955 F.2d 731, 739 (D.C. Cir. 1992). Thus, we feel compelled to address this issue even though the parties neither briefed nor argued it.

Section 92 was enacted in 1916 as an amendment to section 13 of the Federal Reserve Act of 1913, Pub. L. No. 63-43, § 13, 38 Stat. 251, 263-64 (1913). Pub. L. No. 64-270, § 92, 39 Stat. 752, 753 (1916). The relevant portions provided as follows:

> Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

. . . .

"That in addition to the powers now vested by law in national banking associations . . . any such association located and doing business in any place the population of which does not exceed five thousand inhabitants . . . may . . . act as the agent for any fire, life, or other insurance company. . . ."

In 1918, Congress enacted the War Finance Corporation Act of 1918, Pub. L. No. 65-121, 40 Stat. 506 (1918). In Title I, Congress created the War Finance Corporation and detailed its structure and powers. The final section of Title I—section 20—provides, in it entirety:

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"*Sec. 5202.* No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

> "Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.
>
> "Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.
>
> "Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.
>
> "*Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act.*" (Emphasis added.)

The italicized portions indicate the additions to section 5202 effected by the War Finance Corporation Act. Obviously, Congress omitted the remaining provisions of section 5202 that, in the Act of 1916, had followed immediately after the provision entitled "Fifth"—including the text of section 92.[1]

Contrary to the view of the D.C. Circuit, we believe that this omission was inadvertent and thus we do not interpret it as having effected a repeal of section 92. Congress did not expressly repeal section 92 when it enacted the War Finance Corporation Act. We recognize, however, that an amendment to a statute that omits certain provisions almost always reflects Congress' intent to repeal the omitted provisions. However, just as we do not blindly give effect to an express repeal of a statute, *see In re Adamo*, 619 F.2d 216, 222 (2d Cir.) (express repeal of statutory provision not given effect because to do so would enforce an obvious mistake and contravene both common sense and statutory purpose), *cert. denied*, 449 U.S. 843 (1980), we do not necessarily give effect to an omission. Indeed, "the rule that amendment 'to read as follows' repeals everything omitted" is only an "aid[] in the interpretation of statutes, not [a] syllogism[]. [It] must yield

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[1] Indeed, the omission is reflected in the United States Code, which labels 12 U.S.C. § 92 "[o]mitted."

where [its] application would be inconsistent with the purposes of the statute." *FTC v. Standard Motor Products, Inc.*, 371 F.2d 613, 617 (2d Cir. 1967); see also *S.E.C. v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 & n.8 (maxims of statutory construction are but aids to interpretation).

Thus, we next consider the purpose of the War Finance Corporation Act in general, and section 20 in particular. The text and its legislative history indicate that the purpose of the Act was to ensure that sufficient capital flowed to industries deemed necessary to the prosecution of World War I. As stated by then Secretary of the Treasury, W. G. McAdoo, in a written statement presented before the Senate Committee on Finance and included in the Senate Report, S. Rep. No. 286, 65th Cong., 2d Sess. 4 (1918):

> The bill is purely a war measure designed to conserve the supply of labor and materials for the purposes of the war, and to help supply the war's financial requirements, and to give them a first claim on capital seeking investment in like manner as the war's material requirements have been given a first claim on production.

Congress sought to achieve this purpose by creating two institutional mechanisms: a War Finance Corporation and a Capital Issues Committee.[2] Among other things, the Act empowered the War Finance Corporation to make advances to banks who had loans outstanding to, or had purchased the bonds of, entities "whose operations shall be necessary or contributory to the prosecution of the war." War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 7, 40 Stat. 506, 508 (1918). Thus, Congress in-

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[2] The Capital Issues Committee, whose functions were set forth in Title II, was designed to regulate the sale of new issues of securities. War Finance Corporation Act of 1918, Pub. L. No. 65-121, § 203, 40 Stat. 506, 513 (1918).

tended the War Finance Corporation to serve as a conduit for channelling funds, generally via banks, to war industries.

That successful prosecution of the war was the sole purpose of the War Finance Corporation Act is underscored by the fact that it was a temporary measure. Section 1 provided that the Corporation's powers would terminate (with the exception of powers incidental to its liquidation and winding up), and section 206 provided that Title II would continue in effect only until, six months after the end of the war, with such date to be fixed by the President. Thus, the entire enactment was drafted to be virtually self-destructing.

We next focus on the purpose of section 20 of the War Finance Corporation Act, and begin with its legislative history. Section 20 was offered on the floor of the House by Representative Michael F. Phelan of Massachusetts during consideration of the House version of the bill, H.R. 10608, 76 Cong. Rec. 3804 (1918). The only explanation of the amendment was offered by Representative Claude Kitchin, who stated:

> If we do not put in this provision, and make the change in the law which this amendment makes, it will tie the hands of the national banks from helping out these corporations.
>
> . . . .
>
> I think there were some of the committees that had this amendment under consideration and thought that this section of the Revised Statutes should not apply to this limitation.

Id. (statement of Rep. Kitchin). The amendment was agreed to without debate, and the House adopted its version of the bill.

The House bill and the Senate version, S. 3714, were then reconciled by a conference committee, which settled

on a version that included section 20. The House conference report, H.R. Conf. Rep. No. 448, 65th Cong., 2d Sess. 19 (1918) (Statement of Managers), explained the effect of section 20 as follows:

> This section provides that section 5202 of the Revised Statutes of the United States relating to the indebtedness of a national banking association shall not apply in the case of any liability incurred by such association under the provisions of the War Finance Corporation Act. This provision does not appear in the Senate Bill. The conferees adopt the House section.

When the Senate version of this conference report, S. Doc. No. 211, 65th Cong., 2d Sess. (1918), was submitted to the Senate by Senator Simmons, the Senator explained the significant amendments incorporated from the House version of the bill, but he did not address the addition of section 20. 76 Cong. Rec. 4376-79 (statements of Sen. Simmons). Ultimately, both the Senate and House agreed to enact the conferees' version of the bill.

No mention of the insurance powers of national banks exists in the legislative history. Thus, the legislative history indicates that the sole purpose of the revision was to ensure that section 5202 did not apply to liabilities incurred by a national bank in connection with the War Finance Corporation.

This view of the purpose of section 20 is supported by the text of the provision, which shows that the only substantive addition to the existing version of section 5202 was the following paragraph: "Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act." In sum, it is obvious from a reading of both section 20 in its entirety, and its legislative history, that the amendment was designed to further the general purpose of the Act by ensuring that national banks could obtain funds from the War Finance Corporation without

running afoul of the requirement, contained in the opening paragraph of section 5202, that certain bank liabilities not exceed the capital requirements set forth in the section.

Given the purposes of the Act as a whole and section 20 in particular, we believe that Congress did not intend to alter the insurance agency powers of national banks when it enacted section 20. First, on a general level, it would be wholly incongruous for Congress to repeal a provision regarding the totally unrelated matter of insurance agency powers in an emergency measure directed at winning the war. Second, on a more specific level, it is highly unlikely that Congress' intent to render existing limits on national bank liabilities consistent with the operations of the War Finance Corporation would just happen to coincide with an intent to repeal provisions regarding national banks' insurance agency powers. Third, we cannot believe that Congress intended to make permanent changes to national banks' insurance agency powers in an act that by its terms would virtually self-destruct six months after the conclusion of the war. Fourth, if it actually was Congress' intent to effect such a permanent change to an unrelated area of law, we would expect some clue to this intent to appear somewhere in the legislative history, but we have searched it and it does not. Fifth, it would be—at least arguably—inconsistent for Congress to repeal a provision that, as we explain below, bars national banks in large towns from engaging in insurance agency activity when the primary purpose of Title I of the War Finance Corporation Act was to orient national bank activity toward financing war industries.

We also note that the structure of section 20 supports our view that section 92 was inadvertently omitted. The omission occurs precisely after the insertion of the new paragraph entitled "Sixth"—the provision that rendered the War Finance Corporation Act consistent with exist-

ing national banking law. This gives rise to the inference that the drafters of section 20 forgot to include the remainder of section 5202 after they inserted the new paragraph.

For these reasons, we believe the only rational interpretation of the words "amended so as to read as follows" is that, contrary to the general rule, they do not effect a repeal of 12 U.S.C. § 92. Thus, section 92 remains valid law. We now turn to the issues raised by the parties.

B. Standard of Review

ALTA first questions the district court's application of the principles of deference to agency action set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984), because the OCC's decision to permit Chase Manhattan to sell title insurance took the form of an interpretive ruling rather than a regulation, as was the case in *Chevron*. We disagree. An OCC ruling interpreting a statute that it is charged with enforcing is entitled to deference in accordance with *Chevron*. *See, e.g., Clarke v. Securities Indust. Ass'n*, 479 U.S. 388, 403-04 (1987) (citing Chevron with approval and deferring to the Comptroller's interpretation of the National Bank Act, given that the provision in question was ambiguous and the Comptroller's interpretation was reasonable); *see also Securities Indust. Ass'n v. Clarke*, 885 F.2d 1034, 1042 (2d Cir. 1989) (acknowledging applicability of principles of deferential review to Comptroller's decision), *cert. denied*, 493 U.S. 1070 (1990); *American Ins. Ass'n v. Clarke*, 865 F.2d 278, 280-81 (D.C. Cir. 1988). Thus, the test set forth in Chevron is fully applicable to the OCC decision at issue in this case.

Under *Chevron*, we must first decide "whether Congress has directly spoken to the precise question at issue." *Chevron* 467 U.S. at 842. If, however, the statute is

"silent or ambiguous with respect to the specific issue," *id.* at 843, then we will uphold the OCC's interpretation provided it is reasonable and not "arbitrary, capricious, or manifestly contrary to the statute." *Id.* at 844.

C. Section 92

ALTA argues that the district court erred in upholding the OCC's view that 12 U.S.C. § 92 places no limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh). ALTA contends that section 92 impliedly prohibits national banks from selling insurance—including title insurance—in towns with more than 5,000 inhabitants.

To determine the scope of section 92, we turn first to the relevant statutory language:

> That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company. . . .

This provision obviously provides no explicit limitation on national bank activity. But the maxim of *expressio unius est exclusio alterius*, used as an aid to construction, leads to the conclusion that Congress intended to prohibit national banks located and doing business in towns with *over* 5,000 inhabitants from engaging in the insurance agency business. *See, e.g., Water Transp. Ass'n v. ICC*, 722 F.2d 1025, 1029 (2d Cir. 1983). Applying this principle, had Congress intended to grant national banks located in towns with large populations the authority to sell insurance, it would never have lim-

ited the grant of authority in section 92 to national banks in locations with under 5,000 inhabitants. And if at the time of enactment Congress believed that all national banks—regardless of location—already possessed the authority to sell insurance, this provision would have been superfluous. Thus, we believe that the language of section 92 evinces Congress' intent to bar national banks that fall outside of the provision's geographical restrictions from acting as insurance agents.

This statutory construction, of course, would have to "yield to clear contrary evidence of legislative intent." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). But here, the legislative history lends support to our view of the statute. Although the legislative history of section 92 is sparse, two documents in particular shed light on the backdrop to Congress' enactment of this legislation in September 1916. The first document, published by the Federal Reserve Board in February 1916, is a letter from its counsel to the Governor of the Federal Reserve Board, opining that the insurance business did "not come within either the expressed or implied powers of national banks." 2 Fed. Res. Bull. 73, 74 (Feb. 1916). The letter concluded with the following statement: "Any such extension of the powers of national banks must be left to the consideration of Congress." *Id.*

The second document is a June 1916 letter from the then Comptroller of the Currency, John Skelton Williams, to the Senate Banking Committee, in which he proposed an amendment to the National Bank Act. 53 Cong. Rec. 11001 (1916). In the letter, the Comptroller explained that "[n]ational banks are not given either expressly nor by necessary implication the power to act as agents for insurance companies." *Id.* Enclosed with the letter was a draft of a proposed amendment "designed to empower national banks located in towns of not over 3,000 population . . . to act as agents for the placing of insurance

policies." *Id.* The Comptroller explicitly stated that "from the standpoint of public policy and banking efficiency this authority should be limited to banks in small communities." *Id.* This letter was entered into the Congressional Record by the Chairman of the Senate Banking Committee, Sen. Robert L. Owen. *Id.* The Comptroller's amendment was ultimately enacted, albeit with the modification that national banks in towns with populations up to 5,000 could sell insurance. *Id.* at 11153.

These two documents indicate that when Congress enacted section 92, it did so in the belief that under existing banking law (specifically 12 U.S.C. § 24 (Seventh)) national banks had no authority to engage in insurance agency activities. Furthermore, the Comptroller's letter provided evidence that Congress intended to withhold from national banks, located in towns with over 5,000 inhabitants, the authority to sell insurance. Accordingly, the legislative history supports our construction of the statute.

Our view of the statute derives further support from *Saxon v. Georgia Ass'n of Independent Ins. Agents*, 399 F.2d 1010 (5th Cir. 1968). In *Saxon*, the court relied on section 92 to declare unlawful Comptroller Saxon's ruling that permitted a national bank to sell its borrowers "broad forms of automobile, home, casualty and liability insurance." *Saxon*, 399 F.2d at 1012. The court applied the principle of *expressio unius est exclusio alterius*, and analyzed the legislative history to interpret section 92 such that "national banks have no power to act as insurance agents in cities of *over* 5,000 population." *Id.* at 1013.

The OCC contends that *Saxon* is irrelevant to the issue before us.[3] The OCC attempts to distinguish *Saxon* on the ground that it did not involve a form of insurance, like title insurance, that is essential to a bank's ability to

[3] The OCC also contends that Saxon was wrongly decided. We disagree.

provide financing. The *Saxon* court, however, did not rest its decision on the nature of the insurance activities engaged in by the bank. Instead, as we have stated, it simply viewed section 92 as an expression of Congress' intent that "national banks have no power to act as insurance agents in cities of *over* 5,000 population." *Id.* at 1013.

The OCC also urges us to disregard *Saxon* because the D.C. Circuit in *Independent Bankers Ass'n v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980), followed a different approach to interpreting section 92. The *Heimann* court held that section 92 did not bar a national bank from selling credit life insurance in a town with over 5,000 inhabitants. *Id.* at 1170. Although the court stated in a footnote that "[b]y its own terms, the statute does not address the authority of national banks in larger towns or cities to act as agents for life insurance companies," *id.* at 1170 n.18, it seems to have based its decision largely on the nature of credit life insurance rather than on the issue of whether section 92 impliedly operates as a bar to certain national bank activity. Thus, we see no reason to depart from our view of section 92.

Having determined that section 92 impliedly bars national banks in towns with more than 5,000 inhabitants from engaging in insurance agency activities in general, we must now decide whether this prohibition applies to title insurance activities in particular. Section 92 applies to national banks that "act as the agent for *any* fire, life, or *other* insurance company." 12 U.S.C. § 92 (emphasis added). We believe that this language makes inescapable the conclusion that Congress intended this provision to apply to "any . . . insurance company," and a title insurance company surely is an insurance company. *Id.* Thus, section 92 impliedly bars national banks from engaging in the title insurance agency business.

The OCC again relies on *Heimann*, asserting that, like credit life insurance, title insurance activities are outside

of section 92's limits on national bank activity. In upholding the OCC regulations at issue in Heimann, the court reasoned that "[u]nlike other forms of insurance coverage . . . credit life insurance is a limited special type of coverage written to protect loans. In no way does it involve the operations of a general life insurance business." *Heimann*, 613 F.2d at 1170.

Heimann, however, does not persuade us that section 92 is inapplicable to a national bank's title insurance activities. First, as the *Heimann* court pointed out, credit life insurance is unique in that it protects only the lender's interest by insuring that his loan will be repaid even if the borrower dies. When a bank sells credit life insurance, it is similar to the bank demanding a higher price for the loan to compensate for its assumption of a risk inherent in any extension of credit made pursuant to a borrower's promise to pay—the risk that the borrower's death will render him personally incapable of repaying the loan. Title insurance, by contrast, insures the borrower's equity in the property as well as the bank's interest in the mortgage it holds. Second, *Heimann's* persuasiveness is further eroded by its scant analysis of section 92 and its failure to discuss the provision's legislative history. Thus, *Heimann* is not dispositive of section 92's bearing on a national bank's power to sell title insurance.

D. Section 24 (Seventh)

In addition to the express powers granted national banks by the National Bank Act, Section 24 (Seventh) of the Act grants them "all such incidental powers as shall be necessary to carry on the business of banking." The OCC contends that under judicial interpretations of this provision, a bank's sale of title insurance, as agent, is "incidental" to the banking business within the meaning of section 24 (Seventh), and thus the OCC's decision is consistent with the National Bank Act.

Based on our interpretation of section 92, we see no need to determine the scope of section 24 (Seventh). We

are guided by the principle that where two statutes conflict, the statute that addresses the matter under consideration in specific terms controls over one that does so in a general manner, unless of course Congress has manifested a clear intent to the contrary. *See Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 445 (1987). We discern no evidence that Congress intended section 24 (Seventh) to control section 92. Thus, even if the general grant of power contained in section 24 (Seventh) were sufficiently broad to encompass the title insurance agency business, so construed the statute would have to yield to the specific limits on insurance activity contained in section 92. For this reason, we do not decide whether the title insurance agency business is "incidental" to banking within the meaning of section 24 (Seventh).

III.

Because we find that section 92 prohibits national banks located and doing business in places with over 5,000 inhabitants from engaging in the title insurance agency business, we reverse the judgment of the district court and direct it to enter summary judgment for the appellants. To defer to the OCC in this case would flout Congressional intent—something we remain unwilling to do.

Reversed.

APPENDIX B

OPINION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 CIV. 6939 (MJL)

AMERICAN LAND TITLE ASSOCIATION and
NEW YORK STATE LAND TITLE ASSOCIATION,
Plaintiffs,

-v.-

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an Agency of the United States,
Defendants,

and

THE CHASE MANHATTAN BANK, N.A.,
Intervenor-Defendant.

OPINION AND ORDER

(Filed Aug. 7, 1991)

MARY JOHNSON LOWE, D.J.

Before this Court is plaintiffs' motion pursuant to Fed. R. Civ. P. 56 for summary judgment. Defendants cross-move for dismissal under Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, defendants' motion is granted and plaintiffs' motion is denied.

BACKGROUND

The OCC is the federal agency charged with the supervision and regulation of national banks and the administration of the National Bank Act of 1864 (the "NBA").

12 U.S.C. §§ 1 et seq. National banks are permitted to engage in their authorized activities through operating subsidiaries, and the provisions of the Federal banking laws are applicable to those operating subsidiaries. 12 C.F.R. § 5.34(d)(1) requires a national bank to notify the Deputy Comptroller in the appropriate district when it proposes to perform new activities through such an operating subsidiary. The Deputy Comptroller must then review the proposal in order to determine whether or not the new activities are within the scope of a national bank's legally permissible activities. 12 C.F.R. § 5.34(d) ii.

Pursuant to the above rules, on March 3, 1989, Chase Manhattan, a national banking association subject to the NBA, notified the OCC that it intended to establish two operating subsidiaries to engage in the business of issuing title insurance. Chase Manhattan, through the subsidiaries, wished to sell title insurance, as agent, to owners and lenders in connection with residential and commercial real estate loans made by the bank and its affiliates.[1] Under Chase Manhattan's proposal, the subsidiaries would perform certain services, including reviewing title abstracts, obtaining updated abstract and title opinions, preparing preliminary and final title insurance commitments on behalf of insurers and providing clerical assistance incidental to the subsidiaries' activities.

The bank outlined the proposed procedures for issuing title insurance as follows:

1. there would be no obligation on the part of the borrowers to use the services of the subsidiaries;

2. the lender's decision to grant or deny a mortgage would not be affected by whether a borrower chose to purchase title insurance from the bank;

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[1] Chase Manhattan requires customers to obtain title insurance as a condition to obtaining mortgage loans in order to protect the lender's security interest in the mortgaged property.

3. no preferential treatment would be accorded to customers who chose to obtain title insurance through the bank, and;

4. customers would be advised of the services offered by the subsidiaries and of the relationship between the lender and the subsidiaries.

The proposed plan would include procedures that would guarantee the subsidiaries' compliance with all federal and state laws and regulations applicable to title insurance activities.

By letter dated June 20, 1989, the Comptroller approved Chase Manhattan's proposal. In granting approval, the Comptroller relied upon two provisions of the Act: 12 U.S.C. § 24 (Seventh)[2] and 12 U.S.C. § 371.[3] The Comptroller specifically found that title insurance falls within the incidental powers of a national bank, noting that title insurance agency activities are both convenient and useful to the bank's express power to make real estate loans and that there has been judicial recognition that certain forms of insurance related to traditional lending activities of banks are within the incidental powers of a bank.

Plaintiffs challenge the validity of the Comptroller's ruling. They argue that the sale of title insurance is outside the scope of authority conferred on national banks by the NBA, and is contrary to judicial precedent. They contend that 12 U.S.C. § 92, which permits national banks doing business in towns with populations of less than 5,000 to "act as the agent for any fire, life, or other insurance company," prohibits national banks in larger

[2] 12 U.S.C. § 24 (Seventh) provides, in pertinent part, that national banks may "exercise . . . all such incidental powers as shall be necessary to carry on the business of banking."

[3] 12 U.S.C. § 371 expressly authorizes national banks to "make, arrange, purchase or sell loans or extensions of credit secured by liens on interest in real estate."

towns from engaging in the business of title insurance. In essence, plaintiffs seek a declaratory judgment that the Comptroller acted outside of his scope of authority and contrary to the NBA when he granted approval to Chase Manhattan to operate subsidiaries engaged in the business of issuing title insurance.

Defendants ask that the Court uphold the Comptroller's ruling that title insurance activities are not prohibited by 12 U.S.C. § 92, are related to the traditional lending powers of banking, are incidental to the business of banking and therefore fall within the meaning of the incidental powers clause of the NBA. They argue that § 92 relates only to the sale of traditional insurance, which is substantially unlike title insurance. Finally, defendants argue that the Comptroller's decision to authorize the sale of title insurance by national banks and their subsidiaries must be accorded great deference by this Court, as this Court is reviewing an agency's interpretation of its governing statute.

DISCUSSION

I. *Decision of the Comptroller*

In a letter dated June 20, 1989, Senior Deputy Comptroller J. Michael Shepard approved Chase Manhattan's application to operate a subsidiary engaged in the business of title insurance activities. Mr. Shepard relied on OCC Interpretive Letter #368, dated July 11, 1986 which concluded that national banks are authorized to act as agents for the sale of title insurance. In Letter #368, in analyzing the incidental powers clause, the Comptroller discussed two tests the courts have used when determining whether a given activity is incidental within the meaning of 12 U.S.C. § 24. Letter #368 at 77,838.

A. *The Defendants' Arguments*

First, under *Arnold Tours, Inc. v. Camp*, 472 F.2d 427 (1st Cir. 1972), an activity has been defined as incidental to the business of banking if it is "convenient or

useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *Id.* at 432. *See also, M & M Leasing Corp. v. Seattle First National Bank*, 563 F.2d 1377 (9th Cir. 1972); *Guaranty Mortg. Co. v. Z.I.D. Associates*, 506 F. Supp. 101 (S.D.N.Y. 1980). Second, the Comptroller has found that an activity is incidental to the business of banking where the activity in question is similar to a permitted activity. *See e.g., Independent Bankers Assoc. v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979) *cert. denied*, 449 U.S. 823 (1980). Although the OCC views the *Arnold Tours* test as too restrictive (and has maintained this position since the issuance of Letter #368: *See e.g., American Ins. Assoc. v. Clarke*, 865 F.2d 278 (D.C. Cir. 1988); *Securities Industry Assoc. v. Clarke*, 885 F.2d 1034, 1048 (2d Cir. 1989)) it found that under either the "convenient and useful" or the "similar to a permitted activity" test, title insurance activities are incidental to the business of banking.

The Comptroller found that title insurance meets the *Arnold Tours* test in that it is convenient and useful in connection with making real estate loans, an express power granted to national banks. 12 U.S.C. § 371. The Comptroller observed that banks often require title insurance coverage to protect against contingencies that would prevent the bank from being able to foreclose on the collateral. He noted that it would be both convenient and useful for borrowers to discuss and purchase title insurance coverage while negotiating a real estate loan. The Comptroller clearly views title insurance as a logical compliment to the review of abstracts of title, legal title opinion, and title insurance commitments already conducted by banks in connection with making real estate loans. Similarly, every loan made by a bank that is collateralized by a parcel of real estate is conditioned on an examination of the relevant land records. National lenders who make real estate loans regard title policy as an

essential part of their loan package, helping them to transfer these loans as they would other commercial property. Powell on Real Property, ¶ 1028 at 92-3.

Furthermore, title insurance is a contract under which the insurer indemnifies the insured for a specific amount against any loss through then existing defects in title. Powell on Real Property, ¶ 1029 at 92-5-29-7. The lender's policy protects the lender's interest in that it insures a valid enforceable lien in the event of a default. In this sense, the Comptroller found that title insurance is similar to an extension of credit, a traditional bank function. Banks frequently prepare and review abstracts of title and legal title opinions concerning mortgaged real property. In this respect, the Comptroller concluded that title insurance, like credit life insurance, is a limited type of coverage similar to a traditional bank practice connected to an extension of credit and therefore, incidental to the business of banking.

A similar position was adopted by the D.C. Circuit in *Independent Bankers Assoc.*, 613 F. 2d 1164. There the court observed that credit life insurance (which includes health, accident and life insurance issued as protection for a loan) is essential where ordinary loans on personal security are made, is a limited type of coverage that protects loans, and is connected to an extension of credit. For these reasons, the court held that credit life insurance is incidental within the meaning of 12 U.S.C. § 24 (Seventh) *Id.* at 1170.

B. *The Plaintiffs' Arguments*

Plaintiffs rely on *Saxon v. Georgia Ass'n of Independent Ins. Agents, Inc.*, 399 F.2d 1010 (5th Cir. 1968), in which there was a dispute over a national bank's authority to issue broad forms of insurance. The *Saxon* court held that the Office of the Comptroller acted outside its scope of authority and contrary to § 92 when it granted national banks the very broad and unlimited

power to "act as agent in the issuance of insurance which is incidental to banking transactions."[4] *Id.* at 1012. However, in Letter #368, the Comptroller distinguished title insurance from the types of traditional insurance at issue in *Saxon*. He noted that title insurance is unique and unlike the broad forms of insurance activities regulated by 12 U.S.C. § 92 and therefore not barred by the *Saxon* decision. Title insurance differs from other forms of insurance since it insures title as of the date of the policy against loss by reason of situations arising out of past conduct. Powell on Real Property, ¶ 1030, at 92-7. There are no risks insured based on actuarial computations of future probabilities, as in most forms of insurance. In this respect, title insurance is similar to municipal bond insurance, an insurance activity that has been held to be incidental to the business of banking and not prohibited by 12 U.S.C. § 92 *See, e.g., American Ins. Ass'n v. Clarke*, 656 F. Supp. 404, 410 (D.D.C. 1987), *aff'd*, 865 F.2d 278 (D.C. Cir. 1988) (municipal bond insurance distinguished from other types of insurance based on the absence of actuarial computations in determining risk).

II. SCOPE OF REVIEW

The principles regarding judicial deference to agency interpretation of its governing statute are outlined in *Chevron U. S. A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 842-45, (1984). In reviewing an agency made rule, the first issue the court must decide is whether Congress has addressed the specific ques-

[4] Pursuant to the OCC ruling at issue in *Saxon*, national banks began to engage in the business of broad forms of automobile, home, casualty and life insurance. *Id.* at 1012. The 5th Circuit, in determining whether the Comptroller had acted within the statute, read § 92 as an express limitation of the incidental powers granted by 12 U.S.C. § 24 (Seventh) by expressly authorizing the relevant insurance sales only in towns with populations of less than 5,000, and held that the OCC ruling was contrary to § 92. *Id.* at 1016.

tion at issue. If congressional intent is clear in the statute, the court must enforce that intent. If however, Congress has not addressed the specific question at issue, the court must determine whether the agency's ruling is based on a reasonable interpretation of that statute. In upholding an agency's decision "[t]he court need not conclude that the agency construction was the only one it permissibly could have adopted, . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11. The agency interpretation is controlling unless it is "arbitrary, capricious or manifestly contrary to the statute." *Id.* at 844. These principles of judicial review of agency interpretation apply to the Comptroller's interpretation of the NBA. *American Insurance Assoc.*, 865 F.2d at 281; *Securities Industry Assoc.*, 885 F.2d at 1042. Thus, under the principles outlined in *Chevron* and its progeny, this Court must defer to the Comptroller's decision if it is rational and consistent with the statute.

Plaintiffs argue that the Comptroller's approval of the Chase Manhattan proposal violates the NBA and is not entitled to deference. In support, plaintiffs rely heavily on *Saxon*, 399 F.2d 1010, discussed *supra*. Plaintiffs argue that title insurance falls within the scope of § 92 and, inasmuch as Chase Manhattan has not indicated that it intends to limit its title insurance activities to towns with populations of less than 5,000, the Comptroller's approval of the Chase Manhattan proposal is contrary to the statute. 12 U.S.C. § 92.[5]

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[5] There is some dispute as to whether *Saxon* was correctly decided. *Independent Ins. Agents v. Board of Governors*, 736 F.2d 468, 477 n. 6 (8th Cir. 1984). However, whether or not *Saxon* was correctly decided, it does not control the outcome of the case at bar. As discussed, *supra*, *Saxon* involved national banks' authority to sell broad forms of automobile, home, casualty and liability insurance, activities *specifically prohibited* by the NBA (12 U.S.C. § 92). *Saxon*, 399 F.2d at 1012. As far as the instant case, the NBA does not

However, the Comptroller is entitled to "look beyond a label given a certain activity to determine whether or not it is permissible." *American Ins. Assoc.*, 656 F. Supp. at 408. The Comptroller is not precluded from determining that title insurance falls outside of the scope of activities discussed in § 92 even though it is labeled "insurance". This point is illustrated by the fact that courts have held in the past that various types of "insurance" are incidental to the business of banking and not prohibited by § 92. *See e.g., American Ins. Assoc.* 865 F.2d 278 (holding that Comptroller's determination that municipal bond insurance falls within the scope of the incidental powers clause is rational under the NBA) and *Independent Bankers Assoc.*, 613 F.2d 1170 (holding that Comptroller's finding that the sale of credit life insurance falls within the incidental powers clause is rational under the NBA).

III. The Conclusion of This Court

As noted above, 12 U.S.C. § 24 (Seventh) grants national banks the authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking." This clause has been broadly construed to include activities which are "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act." *M & M Leasing Corp.*, 563 F.2d at 1382.

Although the Comptroller argues that the *Arnold Tours* test, (used to determine whether a given activity is "incidental", discussed *supra*, at § I.A.) is unnecessarily restrictive, he has found that even under the *Arnold Tours* test, title insurance is incidental to the business of banking within the meaning of 12 U.S.C. § 24 (Seventh). As we agree that title insurance agency activities satisfy

specifically prohibit national banks from issuing title insurance, and Congressional intent is therefore unclear.

the requirements of the *Arnold Tours* test, we decline to address the Comptroller's position that the test is too restrictive.

Title insurance is commonplace where loans collateralized by a parcel of real property are made and has, in effect, become an essential element of the real estate package. Therefore, it is a rational conclusion that the sale of title insurance in connection with real estate loans made by a national bank is incidental to the express power of a national bank to make real estate loans. Further, it is rational to conclude that title insurance, like credit life insurance, is an activity considered incidental to the business of banking in that it is a limited type of coverage that protects the lender in the event of a default.

We find that it is neither arbitrary nor capricious to view 12 U.S.C. § 92 as a supplemental powers provision, not a limitation on national banks' incidental powers under 12 U.S.C. § 24 (Seventh). Further, even if § 92 were viewed as a limitation, we find that the Comptroller's determination that title insurance is so significantly different from the broad forms of insurance addressed in § 92 as to remove title insurance from the scope of § 92 is rational under the NBA.

The question before this Court is not whether the NBA expressly authorizes national banks to engage in the business of title insurance agency activities. Rather, the question is whether the Comptroller's determination that a bank may engage in the business of title insurance agency activities is rational under the NBA. The Comptroller determined that the activities proposed by Chase Manhattan are incidental to banking business in that they are convenient and useful in connection with its express power to make real estate loans and that they are similar to an extension of credit, an activity already performed and permitted. As the Comptroller's determination was neither erroneous nor arbitrary or capricious, this Court

will not disturb it. Therefore, defendants' motion to dismiss is granted and plaintiffs' motion for summary judgment is denied.

It Is So Ordered.

/s/ Mary Johnson Lowe
United States District Judge

Dated: July 31, 1991
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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89 Civil 6939 (MJL)

AMERICAN LAND TITLE ASSOCIATION and
NEW YORK STATE LAND TITLE ASSOCIATION,
Plaintiffs,

-against-

ROBERT L. CLARKE, in his official capacity as Comptroller of the Currency, and THE OFFICE OF THE COMPTROLLER OF THE CURRENCY, an Agency of the United States,
Defendants,

and

THE CHASE MANHATTAN BANK, N.A.,
Intervenor-Defendant.

JUDGMENT

[Filed Aug. 15, 1991]

Plaintiff having moved pursuant to F.R.Civ.P. 56 for summary judgment, defendants having cross-moved for dismissal under F.R.Civ.P. 12(b)(6), and the said motions come before the Honorable MARY JOHNSON LOWE, U.S.D.J., and the Court thereafter on August 7, 1991, having handed down its opinion and order (#68481); denying plaintiffs' motion for summary judgment, and granting defendants' motion to dismiss, it is,

ORDERED, ADJUDGED AND DECREED: That plaintiffs' motion for summary judgment be and it is hereby denied, and it is further,

ORDERED, that defendants' motion to dismiss be and it is hereby granted, and it is further,

ORDERED, that the complaint be and it is hereby dismissed.

s/ James M. Parkinson
Clerk

DATED: New York, New York
August 15, 1991

APPENDIX C

OCC APPROVAL LETTER

Comptroller of the Currency
Administrator of National Banks

Washington, D.C. 20219

June 29, 1989

Mr. Thomas C. Lynch
Executive Vice President
Chase Manhattan Bank, N.A.
1 Chase Manhattan Plaza
New York, New York 10081

Dear Mr. Lynch:

This letter is in response to your notice of March 3, 1989, advising the Office of the Comptroller of the Currency ("OCC") that Chase Manhattan Bank, N.A. ("Bank"), intends to establish two *de novo* operating subsidiaries ("Subsidiaries") to sell title insurance as agent to owners and lenders in connection with residential and commercial real estate loans made by the Bank and its affiliates.

The Subsidiaries will be established pursuant to 12 C.F.R. § 5.34, and will be incorporated in Delaware. One subsidiary will be located at an office of a home mortgage affiliate of the Bank, the other will be located at an office of the Bank. Initially, the Bank will own 100 percent of the voting stock of the Subsidiaries, but may sell up to 20 percent of each subsidiary's stock to an unaffiliated third party. As required by 12 C.F.R. § 5.34(e), the Bank will at all times retain ownership of at least 80 percent of the voting stock of each subsidiary.

It is anticipated that the Subsidiaries will obtain certain services by entering into agreements with entities unaffiliated with the Bank. These services may include reviewing abstracts of title, obtaining updated abstract

and title opinions, preparing preliminary title insurance commitments and final title insurance policies on behalf of insurers, and providing clerical assistance related to the Subsidiaries' title insurance agency activities.

It is also anticipated that the Subsidiaries will enter into agency agreements with one or more title insurance companies. Under these agreements, the Subsidiaries will retain a portion of the premiums paid on the title insurance policies they sell. You have stated that the Subsidiaries will comply with all federal and state laws and regulations applicable to their title insurance agency activities.

The Bank and its affiliates currently require customers to obtain title insurance as a condition to obtaining mortgage loans. This condition is imposed in order to protect the lender's security interest in the mortgaged property. Although the Bank and its affiliates will continue to require mortgagors to obtain title insurance, the Bank has assured the OCC that the following practices will be observed when offering title insurance through the Subsidiaries. Borrowers will be able to purchase title insurance from the insurer of their choice and will not be obligated to use the services of the Subsidiaries. Moreover, a lender's decision to grant or deny a mortgage will not be affected by whether a borrower has purchased title insurance sold by the Subsidiaries nor will a lender accord more favorable treatment to customers who elect to obtain title insurance through the Subsidiaries. Customers will be advised of the services offered by the Subsidiaries and the relationship between the lender and the Subsidiaries.

Discussion

Title insurance is limited purpose insurance designed to protect the owner of an interest in real estate against the risk of loss resulting from title defects or encumbrances on the property. Its development in the late 19th century is related to the mortgage lending activities of

banks and many title insurance companies were departments of banks and trust companies until the 1930s.

The OCC has issued an interpretive letter which concludes that national banks are authorized to act as agents for the sale of title insurance. *See* Letter No. 368,[1] *reprinted in* Fed. Banking L. Rep. (CCH) ¶ 85,538 (July 11, 1986). That conclusion was based on the determination that selling title insurance is incidental to national banks' explicit authority to make, arrange, buy and sell mortgage loans under 12 U.S.C. §§ 24(7) and 371. *Id.* The conclusion also is supported by judicial recognition that it is incidental to banking, and therefore permissible, for national banks to sell forms of limited purpose insurance related to the traditional lending activities of banks. *See Independent Bankers Association of America v. Heimann*, 613 F.2d 1164 (D.C. Cir. 1979), *cert. denied*, 449 U.S. 823 (1980) (credit life insurance).

Your proposal is consistent in all material respects with the proposal which was approved in Letter No. 368. Since 12 C.F.R. § 5.34 permits a national bank to engage in any permissible activity through an operating subsidiary absent supervisory or regulatory concerns, the Bank may proceed with its proposal to establish operating subsidiaries to sell title insurance as agent.

Sincerely,

/s/ J. Michael Shepherd
J. MICHAEL SHEPHERD
Senior Deputy Comptroller
for Corporate and Economic Programs

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[1] The conclusion reached in Letter No. 368 has been challenged as improper rulemaking in *American Land Title Ass'n v. Clarke*, No. A87-CA-408 (W.D. Tx. filed July 8, 1987). The court has not yet ruled on the OCC's motion to dismiss nor issued any orders on other than procedural matters.

APPENDIX D

1986 OCC INTERPRETIVE LETTER

William B. Glidden, Assistant Director, Legal Advisory Services Division. Letter No. 368. July 11, 1986. Interpreting 12 U.S.C. § 24(7); 12 U.S.C. § 371.

This is in response to your request for an opinion as to whether your client, ("Bank"), or its operating subsidiary may perform certain activities related to the sale of title insurance. From correspondence and conversation with you, it is our understanding that the Bank is seeking permission to engage in the following three activities: to act as agent in the sale of title insurance, to enter into a percentage lease and employee sharing arrangement with a title insurance agency, and to acquire a franchise from a title insurance agency to prepare and distribute commitments and policies for title insurance.

In order not to delay any further our response, you agreed, in a discussion with Nancy E. Chase, an attorney with this Office, to limiting your request at this time to the first activity listed, with the Office giving you general information regarding the permissibility of engaging in the remaining activities. This procedure would avoid your supplying the Office with specific information regarding the contractual arrangements contemplated under the second two proposals—information that the Office would need in analyzing the activities and that Ms. Chase understood was not currently available.

Background

Title insurance is a unique type of insurance. Its purpose is to reduce the risk of loss resulting from title defects or encumbrances existing on property at the time the policy is issued. It does not protect the insured from events that happen after the contract is written.

Title insurance can protect, generally through separate policies, both the owners of the property and the mort-

gagee. Different policy forms are required because an owner and a lender are exposed to somewhat different title risks. The owner's policy protects the ownership interest or right of possession in the property. Thus, it is ordinarily issued in an amount equal to the purchase price. The lender's policy protects the lender's security interest in the land securing the repayment of principal and interest. It ensures that the lien has been validly created by the owner of the mortgaged land, that it is enforceable in the event of default, and that the lien has the position of priority of claim on the land as shown in the policy. Consequently, the lender's policy generally covers only the amount of the mortgage loan outstanding.

Title insurance is written on an individual basis and in group or franchise form for the convenience of large users of title insurance policies, e.g., lending institutions. Group policies are simply facilitative arrangements under which a master policy is used to spell out the insurance clause and the various policy provisions. Each title or risk is then covered by a certificate, once the title insurer has had the opportunity to underwrite it. Group policies also are often used in connection with credit life insurance offered by a lender.

After application is made for title insurance, the first document the applicant and other interested persons receive is one which summarizes the underwriter's evaluation of title based on the search and examination of title. This document is commonly known as a title insurance commitment. Its function is to begin the sale or loan "closing" process.

In addition to summarizing the condition of title, the commitment provides a correct legal description of the land involved, identifies the specific form of policy or policies the insured is prepared to issue, the amount of insurance requested, the standard and special exceptions which will appear in the policy or policies (unless removed before closing) and, in most locations, a brief description of the legal instrument required to create the estate or

interest to be insured. The closing agent (an attorney, an escrow company, or an escrow department of a title company or bank) is responsible for coordination among the parties, compliance with all closing instructions received from the parties, proper handling of all legal documents and funds involved in consummating the transaction, and, finally, obtaining a title insurance policy for each party to be insured which complies in form and content with the previously established requirements of the insured.

You stated in your letter that as part of their ordinary duties when making loans secured by real property, loan officers of the Bank frequently have prepared and reviewed for them, or themselves review, abstracts of title and legal title opinions concerning the real property to be mortgaged. You observed that these duties are substantially identical to the duties performed by a title insurance company or agency when it prepares a title insurance commitment and policy.

Because of the importance to a bank of protecting its security interest in its mortgaged property, it is not surprising that banks and trust companies were closely associated with the title insurance business from its inception at the end of the nineteenth century until the Depression. See generally Smith, Evolution of the Title Policy, Title News (Feb. 1976). In discussing the relationship between the growth of the title insurance industry and the demand by lending institutions for insurance to protect real estate mortgage loans, H.M. Johnson, in his article "The Nature of Title Insurance," notes that the lending and insurance functions both were offered originally by banks: "At one time title insurance companies were departments in banking institutions, and their operations were an integral part of the money lending apparatus." See Johnson, The Nature of Title Insurance, 33 J. Risk & Ins. 393, 393 (1966). Likewise, in a book on title insurance, this combination of banking and title insurance is again mentioned: "The majority of

the early ventures into title insurance were made by banks and trust companies who combined the title insurance function with the lending of mortgage money." See Title Insurance Companies (Philo Smith publ.). See also Public Regulation of Title Insurance Companies and Abstracters 0.10.30. (Villanova Press, E.F. Roberts ed. 1961) ("Villanova Treatise").

The first title insurance policy was issued in Philadelphia in 1876 by the Real Estate Title Insurance and Trust Company. More title insurance companies were established soon thereafter "practically all of which consisted of title insurance departments of banks and trust companies." Villanova Treatise at 14 n.2. It is said that "within the following fifty years practically every bank and trust company in Philadelphia had its affiliated title department which examined and insured or guaranteed the title in real estate acquired with the bank's own funds or for the account of its trust estates or its customers." *Id.*

As a result of failure of banks and mortgage guarantee companies during the Depression, many title companies were divested and independent title companies involved only in the title insurance business were organized. Most states now restrict banks from engaging in title insurance, see Memorandum to Board of Governors of the Federal Reserve System from Federal Reserve Bank of Philadelphia (Aug. 31, 1973) (Provident National Corp. application to retain ownership of a title insurance company); however, corporations may still be formed in a number of states, including Oklahoma, to engage in both title insurance and trust business.[1] See Okla. Stat. Ann.

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[1] It is the position of the Office that since national banks are federal instrumentalities, federal law controls what insurance activities are permissible. Therefore, although the reach of the McCarran-Ferguson Act, 15 U.S.C. § 1011 et seq., giving states the authority to regulate "the business of insurance" within their borders is somewhat uncertain, national banks would not be pro-

tit. 6, § 1001A(20) (West 1984). In addition, an operating subsidiary of a savings and loan association may act as an agent or broker for title insurance. See 12 C.F.R. § 545.74(c)(5)(ii).

Although title insurance companies now tend to be independent of banks, there remains a close relationship between certain banking functions and the title insurance business. For example, title insurance companies may perform functions similar to those of banks, such as dealing in mortgage loans, and, depending upon state law, acting as transfer agents and engaging in the trust business.

Furthermore, as mentioned above, title insurance is often purchased in conjunction with the granting of a mortgage loan. In addition to performing a credit analysis, a bank must review the title insurance documents prior to granting a loan to be sure that its security interest in the property will be protected. In cases where banks conduct "closings" for customers, review by the bank of title insurance policies takes on added importance since the bank also must confirm that the policy complies with the borrower's previously established requirements.

Thus, it is important for banks to be familiar with title insurance procedures in connection with their mortgage lending activities. The experience gained in reviewing title insurance documents gives national banks the expertise necessary to perform related agency activities. Although banks may have developed expertise in the title insurance business, the authority of national banks to act as agents in the sale of title insurance must also be established.

Opinion

The National Bank Act provides that national banks shall have the power:

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hibited from selling title insurance even if the activity is impermissible for state banks.

> To exercise . . . all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security . . . .

12 U.S.C. § 24(7). Since national banks are not expressly authorized to sell title insurance, in order for them to engage in that activity, the activity must be incidental to the business of banking. Recently, the Court of Appeals for the First Circuit enumerated a test to be used in determining whether a given activity is incidental to the business of banking. In Arnold Tours, Inc. v. Camp, which invalidated an OCC interpretive ruling authorizing national banks to run travel agencies, the court stated that:

> [A] national bank's activity is authorized as an incidental power, "necessary to carry on the business of banking," within the meaning of 12 U.S.C. § 24, seventh, if it is convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act.

472 F.2d 427, 432 (1st Cir. 1972). Accordingly, under the Arnold Tours test, for an activity to be incidental to the business of banking, it must be connected to the performance by the bank of its express powers.

This office views the Arnold Tours test as too restrictive. Other courts have used broader and more realistic standards, such as finding the activity in question similar to a permitted activity and not prohibited by statute, Miller v. King, 223 U.S. 505 (1912); Wyman v. Wallace, 201 U.S. 230 (1906); finding that the banks have traditionally engaged in similar activities, Colorado National Bank v. Bedford, 310 U.S. 41 (1940); IBAA v.

Heimann, 613 F.2d 1164 (D.C. Cir. 1979); finding that the activity is useful and convenient to the bank in the current competitive climate, First National Bank v. Hartford, 273 U.S. 548 (1927); Colorado National Bank v. Bedford, supra; Franklin National Bank v. New York, 347 U.S. 373 (1954); or finding that the proposed service is a convenience to its customers, Clement National Bank v. Vermont, 231 U.S. 1290 (1913).

However, the Arnold Tours test has been cited with approval by courts in both the Second and Ninth Circuits. See National Retailer Corp. v. Valley National Bank, 590 F.2d 315 (9th Cir. 1979); M&M Leasing v. Seattle First National Bank, 563 F.2d 1377 (9th Cir. 1977); Guaranty Mortgage Co. v. ZID Associates, 506 F. Supp. 101 (S.D.N.Y. 1980).

By applying the several standards cited above, including the more restrictive Arnold Tours test, it can be concluded that the sale of title insurance by national banks in an agency capacity is incidental to banking under 12 U.S.C. §§ 24(7), 371.[2] As you may be aware, the Office has not in the past objected to national banks' offering title insurance as agents. However, the rationale for the Office's position has only been alluded to briefly in earlier opinion letters. Consequently, it is appropriate to set forth our reasoning in more detail at this time.

Pursuant to 12 U.S.C. § 371, national banks are expressly authorized to "make, arrange, purchase or sell

[2] It has been the longstanding position of the Office that a national bank which holds a group insurance policy is acting as a policyholder, not as an agent for the insurer. Consequently, if a bank offers group insurance related to bank loans, the activity is permissible under 12 U.S.C. § 24(7) and does not raise the legal concerns addressed in Saxon v. Georgia Association of Independent Insurance Agents, 399 F.2d 1010 (5th Cir. 1968). Therefore, the Bank may offer its customers title insurance coverage under a group policy arrangement where the Bank holds the master policy without concern for any possible inconsistency with 12 U.S.C. § 92 and the Saxon ruling.

loans or extensions of credit secured by liens on interests in real estate . . . ." Since banks make substantial loans on the security of the real property being purchased, it is important that banks ensure that they have a valid lien on the property that would not be affected by unknown encumbrances. A bank must rely on the integrity of its interest in the real property securing the mortgage loan should the borrower become unable to meet scheduled payments of principal and interest. To conform with prudent banking practices, banks often require title insurance coverage to protect themselves against contingencies that would prevent the bank from being able to foreclose on the collateral.

In addition, banks often sell, in the secondary market, the mortgage loans they have made. In order to provide for the saleability of these loans, banks generally require the borrower to obtain title insurance on the mortgaged property. Therefore, permitting national banks to act as agents in the sale of title insurance in connection with real estate loans made by the banks would be convenient and useful to the banks and to their customers. Title insurance is also important to bank customers to protect their own interests in the mortgaged property. It would be convenient and useful to the customers to be able to discuss title insurance coverage and purchase the policy at the same time the customer negotiates a real property loan at the bank.[3]

Furthermore, the convenience and usefulness of permitting the bank to conduct the agency activity is evident from banks' current involvement with title insurance policies. The agency activity would be merely an extension of or logical complement to the review of abstracts

[3] Arrangements under which banks are authorized both to make loans and offer insurance related to the credit may raise the issue of the potential for illegal tie-ins. It is the opinion of this Office that 12 U.S.C. § 1972 and Federal antitrust law are sufficient protection against this practice.

of title, legal title opinions, and title insurance commitments that banks conduct prior to granting a loan or conducting a closing for a borrower. Accordingly, banks already have the expertise to perform the agency activities and would be able to benefit financially from authorization to enter into agency relationships with title insurance companies and to collect commissions for performing the services.

In addition, banks traditionally have been involved in the title insurance business. Indeed, as discussed above, title insurance originated from and was offered in conjunction with the real estate lending activities of banks and trust companies from the 1870s until the Depression of the 1930s. In this respect, title insurance resembles credit life insurance, the sale of which was considered by the court in IBAA v. Heimann, 613 F.2d 1164 (D.C. Cir. 1979), cert. denied, 449 U.S. 823 (1980), to be a traditional bank practice connected to an extension of credit and, thus, a permissible bank activity.

Moreover, savings and loan associations are authorized by regulation to act as agents in the sale of title insurance. Authorizing the activity for national banks would enable them to compete in an increasingly competitive financial services market. The Office has recognized in its analyses of competitive markets when considering bank merger applications and in its review of state branching provisions when analyzing branch applications that savings and loans offer many of the same services and perform many of the same functions as national banks. In fact, commercial banks and savings and loans are the two largest providers of mortgage loans. See Fed. Res. Bull. A39 (Jan. 1986). Therefore, since national banks and savings and loan associations are increasingly servicing the same markets, national banks should not be disadvantaged as to savings and loans by being prohibited from selling title insurance.

Finally, title insurance, as pointed out above, is a unique form of insurance. It is sufficiently unlike life,

property, and casualty insurance to justify treating it differently from these forms of insurance for regulatory purposes. As a result, its specialized nature distinguishes it from the broad forms of insurance at issue in the Saxon case and brings it within the rationale applied to credit life insurance in IBAA v. Heimann.

Despite the persuasiveness of the incidental powers analysis under 12 U.S.C. §§ 24(7) and 371, the plaintiff in IBAA v. Heimann argued that Saxon stood for the proposition that national banks' incidental powers are limited to those permitted under 12 U.S.C. § 92. The court rejected this argument.[4]

In IBAA v. Heimann, the court expressly stated that the sale of credit life insurance is permissible under the incidental powers clause of 12 U.S.C. § 24(7) since it only serves to protect bank loans and its sale by banks is a traditional banking practice. See IBAA v. Heimann, 613 F.2d at 1168, 1170. Furthermore, the court pointed out that the Saxon opinion can be distinguished since Saxon involved the bank's authority to sell broad forms of automobile, home, casualty, and liability insurance, not, as in the case of credit life, "a limited special type of coverage written to protect loans." *Id.* at 1170.

Since title insurance is a specialized form of insurance traditionally offered by banks, is related to extensions of credit by a bank, and its sale does not involve a bank's acting as agent for broad forms of insurance products, the proposed activity is consistent with the principles enunciated in IBAA v. Heimann. Therefore, based on the opinion of the court in IBAA v. Heimann and for the reasons discussed above, it is my opinion that the Bank may act as agent in the sale of title insurance incidental

[4] A recent Eighth Circuit opinion suggested in a footnote that "there is a strong argument that Saxon was wrongly decided." See Independent Insurance Agents of America, Inc. v. Board of Governors of the Federal Reserve System, 736 F.2d 468, 471 n.6 (8th Cir. 1984).

to its express authority to make loans secured by real property. If the Bank intends to conduct the title insurance agency activities in an operating subsidiary, you should follow the notification procedures under 12 C.F.R. § 5.34 to inform the Office of such intent.

In regard to the remaining activities proposed in your request letter, I offer some suggestions which may be helpful in structuring the arrangements with an outside title insurance agency in such a way as to comply with the laws applicable to national banks. The Office would not object in principle to the Bank's performing the proposed clerical services. Such services, as you have described them, including obtaining an updated abstract and title opinion, noting exceptions and fulfilling requirements, or having requirements fulfilled, as set out in the title opinion, and preparing a preliminary title insurance commitment and a final title insurance policy, appear to be incidental to the functions involved in preparing loan documentation prior to closing on a mortgage loan. Certain additional issues may be raised, however, when the clerical services are performed in conjunction with other arrangements.

Under your second proposal, the Bank would enter into a percentage lease and employee sharing arrangement with a title insurance agency. As you mentioned in your letter, the Office has approved arrangements in which national banks lease excess office space to insurance agencies on a percentage lease basis. See Letter from Brian W. Smith, Chief Counsel (OCC Interpretive Letter No. 274, Dec. 2, 1983), reprinted in [1983-1984 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 85,438. However, you should be aware that if the percentage required under the lease is unusually high, an inference of partnership may arise. This concern is discussed in Letter No. 274.

Also, since you state that the Bank will be performing clerical services for the title insurance agency in office

space leased to the agency by the Bank, a partnership or joint venture may be created if the persons performing the clerical services are considered to be dual employees of the Bank and the insurance agency. Although the Office has permitted national banks to engage in certain partnerships, such participation raises significant legal, policy, and prudential concerns. Thus, the Office would want to review the particular contractual arrangements prior to the Bank's beginning operations under the second proposal. I am enclosing an OCC opinion letter related to a percentage lease and employee sharing program to assist you in structuring your arrangement.

Your third proposal involves the Bank's acquiring a franchise from a title insurance agency to prepare and distribute commitments and policies for title insurance. The Office has not taken a position on whether national banks are authorized to enter into franchise agreements. However, since the term "franchise" seems to be used to describe various business arrangements, there does not appear to be a consistently applied definition on which to base an opinion that would be applicable in all cases. As a result, as you indicated in your letter, the exact nature of the franchisor/franchisee relationship must be determined on a case-by-case basis. Thus, if the Bank decides to enter into a franchise arrangement, the Office would also want to review the terms of the contract to determine if the arrangement would be permissible.

APPENDIX E

1965 OCC INTERPRETIVE LETTER

[Name and address of addressee
redacted in publicly-available copy]

August 3, 1965

This will confirm the telephone conversation of July 22, 1965, between you and a member of our legal staff regarding your letter of July 2, 1965, in which you inquire whether the First National Bank, [name redacted in publicly-available copy of letter] may act as an agent for, or organize and have an interest in, a title insurance and abstract company. [Name of town redacted] according to the 1960 census, has a population of less than 5,000 persons.

Under 12 U.S.C. § 92, a National Bank is authorized to act as a general agent for any fire, life or other insurance company in any place the population of which does not exceed 5,000 inhabitants, according to the last decennial census. Accordingly, so long as the population of [name of place redacted] does not exceed 5,000, the First National Bank may act as a general agent in the issuance of title insurance. In addition, a National Bank, wherever located, may, under its corporate powers contained in paragraph Seventh of 12 U.S.C. 24, act as an agent in the issuance of title insurance which is incident to a banking transaction.

Very truly yours,

/s/ R. Coleman Egertson
Deputy Comptroller of the Currency

APPENDIX F

STATUTORY PROVISIONS INVOLVED

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12 U.S.C. § 21 (Seventh)

Corporate powers of associations

Upon duly making and filing articles of association and an organization certificate a national banking association shall become, as from the date of the execution of its organization certificate, a body corporate, and as such, and in the name designated in the organization certificate, it shall have power—

* * * *

Seventh. To exercise by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of title 62 of the Revised Statutes. . . .

* * * *

Act of Sept. 7, 1916, ch. 461, 39 Stat. 752, 753 (1916).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "Federal reserve Act," approved December twenty-third, nineteen hundred and thirteen, be, and is hereby, amended as follows:

* * * *

That section thirteen be, and is hereby, amended to read as follows:

"Any Federal reserve bank may receive from any of its member banks, and from the United States, deposits of current funds in lawful money, national-bank notes, Federal reserve notes, or checks, and drafts, payable upon presentation, and also, for collection, maturing bills; or solely for purposes of exchange or of collection, may receive from other Federal reserve banks deposits of current funds in lawful money, national-bank notes, or checks upon other Federal reserve banks, and checks and drafts, payable upon presentation within its district, and maturing bills payable within its district.

"Upon the indorsement of any of its member banks, which shall be deemed a waiver of demand, notice and protest by such bank as to its own indorsement exclusively, any Federal reserve bank may discount notes, drafts, and bills of exchange arising out of actual commercial transactions; that is, notes, drafts, and bills of exchange issued or drawn for agricultural, industrial, or commercial purposes, or the proceeds of which have been used, or are to be used, for such purposes, the Federal Reserve Board to have the right to determine or define the character of the paper thus eligible for discount, within the meaning of this Act. Nothing in this Act contained shall be construed to prohibit such notes, drafts, and bills of exchange, secured by staple agricultural products, or other goods,

wares, or merchandise from being eligible for such discount; but such definition shall not include notes, drafts, or bills covering merely investments or issued or drawn for the purpose of carrying or trading in stocks, bonds, or other investment securities, except bonds and notes of the Government of the United States. Notes, drafts, and bills admitted to discount under the terms of this paragraph must have a maturity at the time of discount of not more than ninety days, exclusive of days of grace: *Provided*, That notes, drafts, and bills drawn or issued for agricultural purposes or based on livestock and having a maturity not exceeding six months, exclusive of days of grace, may be discounted in an amount to be limited to a percentage of the assets of the Federal reserve bank, to be ascertained and fixed by the Federal Reserve Board.

"The aggregate of such notes, drafts, and bills bearing the signature or indorsement of any one borrower, whether a person, company, firm, or corporation, rediscounted for any one bank shall at no time exceed ten per centum of the unimpaired capital and surplus of said bank; but this restriction shall not apply to the discount of bills of exchange drawn in good faith against actually existing values.

"Any Federal reserve bank may discount acceptances of the kinds hereinafter described, which have a maturity at the time of discount of not more than three months' sight, exclusive of days of grace, and which are indorsed by at least one member bank.

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than six months' sight to run, exclusive of days of grace, which grow out of transactions involving the importation or exportation of goods; or which grow out of transactions involving the domestic shipment of goods provided shipping documents conveying or securing title are attached at the time of acceptance; or which are secured at the time of acceptance by a warehouse receipt or other such document con-

veying or securing title covering readily marketable staples. No member bank shall accept, whether in a foreign or domestic transaction, for any one person, company, firm, or corporation to an amount equal at any time in the aggregate to more than ten per cent of its paid-up and unimpaired capital stock and surplus unless the bank is secured either by attached documents or by some other actual security growing out of the same transaction as the acceptance and no bank shall accept such bills to an amount equal at any time in the aggregate to more than one-half of its paid-up and unimpaired capital stock and surplus.

"Any Federal reserve bank may make advances to its member banks on their promissory notes for a period not exceeding fifteen days at rates to be established by such Federal reserve banks, subject to the review and determination of the Federal Reserve Board, provided such promissory notes are secured by such notes, drafts, bills of exchange, or bankers' acceptances as are eligible for rediscount or for purchase by Federal reserve banks under the provisions of this Act, or by the deposit or pledge of bonds or notes of the United States."

Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows: "No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association for dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal reserve Act.

"The discount and rediscount and the purchase and sale by any Federal reserve bank of any bills receivable and of domestic and foreign bills of exchange, and of acceptances authorized by this Act, shall be subject to such restrictions, limitations, and regulations as may be imposed by the Federal Reserve Board.

"That in addition to the powers now vested by law in national banking associations organized under the laws of the United States any such association located and doing business in any place the population of which does not exceed five thousand inhabitants, as shown by the last preceding decennial census, may, under such rules and regulations as may be prescribed by the Comptroller of the Currency, act as the agent for any fire, life, or other insurance company authorized by the authorities of the State in which said bank is located to do business in said State, by soliciting and selling insurance and collecting premiums on policies issued by such company; and may receive for services so rendered such fees or commissions as may be agreed upon between the said association and the insurance company for which it may act as agent; and may also act as the broker or agent for others in making or procuring loans on real estate located within one hundred miles of the place in which said bank may be located, receiving for such services a reasonable fee or commission: *Porided, however*, That no such bank shall in any case guarantee either the principal or interest of any such loans or assume or guarantee the payment of any premium on insurance policies issued through its agency by its principal: *And provided further*, That the bank shall not guarantee the truth of any statement made by an assured in filing his application for insurance.

"Any member bank may accept drafts or bills of exchange drawn upon it having not more than three months' sight to run, exclusive of days of grace, drawn under regulations to be prescribed by the Federal Reserve Board by banks or bankers in foreign countries or dependencies or insular possessions of the United States for the purpose of furnishing dollar exchange as required by the usages of trade in the respective countries, dependencies, or insular possessions. Such drafts or bills may be acquired by Federal reserve banks in such amounts and subject to such regulations, restrictions, and limitations as may be prescribed by the Federal Reserve Board: *Provided, however*, That no member bank shall accept such drafts or bills of exchange referred to this paragraph for any one bank to an amount exceeding in the aggregate ten per centum of the paid-up and unimpaired capital and surplus of the accepting bank unless the draft or bill of exchange is accompanied by documents conveying or securing title or by some other adequate security: *Provided further*, That no member bank shall accept such drafts or bills in an amount exceeding at any time the aggregate of one-half of its paid-up and unimpaired capital and surplus."

* * * *

War Finance Corporation Act of 1918, ch. 45, 40 Stat. 506 (1918).

* * * *

SEC. 20. Section fifty-two hundred and two of the Revised Statutes of the United States is hereby amended so as to read as follows:

"SEC. 5202. No national banking association shall at any time be indebted, or in any way liable, to an amount exceeding the amount of its capital stock at such time actually paid in and remaining undiminished by losses or otherwise, except on account of demands of the nature following:

"First. Notes of circulation.

"Second. Moneys deposited with or collected by the association.

"Third. Bills of exchange or drafts drawn against money actually on deposit to the credit of the association, or due thereto.

"Fourth. Liabilities to the stockholders of the association or dividends and reserve profits.

"Fifth. Liabilities incurred under the provisions of the Federal Reserve Act.

"Sixth. Liabilities incurred under the provisions of the War Finance Corporation Act."

* * * *